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NO._____

SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1984

WALTER F. KERRIGAN and
DOROTHY R. KERRIGAN,

PETITIONERS,

vs.

LUCE, FORWARD, HAMILTON & SCRIPPS,
a professional corporation; et al.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

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117 pp

QUESTION PRESENTED

Does the amended complaint filed under Title 42, United States Code, § 1983 with plenary state actions for libel and slander of title state a cause of action?

CERTIFICATION AS TO INTERESTED PARTIES

The undersigned Petitioner, certifies that the following listed parties have an interest in the outcome of this case. These representations are made to enable justices of the Court to evaluated possible disqualifications or recusal.

There are no other interested parties other than those named in the caption of this case and their attorneys of record.

by_____

Walter F. Kerrigan

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No_____

WALTER F. KERRIGAN and
DOROTHY R. KERRIGAN,

PETITIONERS,

vs.

LUCE, FORWARD, HAMILTON & SCRIPPS,
a professional corporation; et al.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

The petitioners, Walter F. Kerrigan and Dorothy R. Kerrigan, appellants in the court below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on

December 17, 1984. That decision affirmed the judgment of the United States District Court for the Southern District of California entered in the above case on October 7, 1983.

OPINIONS BELOW

The unreported opinion and judgment of the United States District Court for the Southern District of California dated October 5, 1983, dismissing petitioners' amended complaint against the respondents LUCE, FORWARD, HAMILTON & SCRIPPS, a professional corporation; STEVEN W. WALL; JULIE A. GREENBERG; SCALES, PATTON, ELLSWORTH & CORBET, a professional corporation; LUKE R. CORBETT; RALPH E. HUGHES; MICHAEL E. WEXLER; ERWIN & ANDERHOLT, a professional corporation; DAVID M. FRANKLIN; MARINOS, STYN & STUDEBAKER, a professional corporation; RONALD L. STYN, JANA W. GREEN, and EDWARD T. BUTLER, are set forth at page A-1 of the appendix. The unreported memorandum of the United States Court of Appeals for the Ninth Circuit is set forth at A-4 of the appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered December 17, 1984, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28, United States Code, § 1257(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, § 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Title 42, United States Code § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District

of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The petitioners commenced this civil rights action with plenary state actions for libel and slander of title in the United States District Court of the Southern District of California on February 17, 1983. Petitioners claim damages from respondents. The case against the respondents was based on Title 42, United States Code, § 1983 with state claims with jurisdiction invoked under Title 28, United States Code, § 1343.

The claims against the respondents was for violation of petitioners' substantive and procedural rights of due process and equal protection of the laws and taking property without due process and equal protection of the laws with pendant state claims for libel and slander of title. The District Court granted respondents' motions to dismiss the complaint and amended complaint premised on

Federal Rule Civil Procedure 12(b)(6). The allegations in the amended complaint, which is attached hereto at pages A-6 to A-68 of the appendix, set forth the following facts:

Plaintiffs do not seek to relitigate matters previously decided in the state courts, nor to obtain a review of any state court judicial decision as all matters are res judicata. It is important to note this action does not relate to proceedings pending before a state court, not to proceedings that have ever been before the state courts, therefore there is no need to give a detailed summary of any state court litigation (A-19).

In one of the state court cases the Appellate Court issued a remittitur to the Superior Court. The clerk of the Superior Court made the entry: "Please be advised that the Remittitur has been received from the Court of Appeal in the above entitled case. The judgment/order is **APPEAL IS DISMISSED**. Respondent to recover Costs on appeal (A-52).

Despite the fact litigation had terminated, the respondent attorneys were dissatisfied with the order entered by the Court of Appeal before it issued its remittitur. The order (A-56) stated:

> "The Motions to Dismiss this wholly frivolous appeal are granted. The appeal is dismissed with a penalty of $1,000.00 imposed against appellant's attorney, Walter F. Kerrigan, for taking this frivolous appeal."

The respondent attorneys had a full and fair opportunity to petition the Court of Appeal for a "rehearing" to modify the order. There were two petitions filed by different parties each requesting $1,000.00, no payee was mentioned and no hearing or findings required by law. The above order was void.

The basis for the claims mentioned in the amended complaint started when the respondent attorneys entered into an agreement with the respondent state Superior Court judge to authorize the filing of an Application For Ex Parte Clarifying Order And Order (A-54 - A-59). Respondent Judge Butler acting without jurisdictin of the person or of the subject matter and acting in the clear absence of all jurisdiction entered an order (A-59) that read in pertinent part "It is ordered that Walter F. Kerrigan pay to Luce, Forward, Hamilton & Scripps the sum of $1,000.00 forthwith."

When petitioner Walter F. Kerrigan ("Kerrigan") did not comply with the void order of the Court of Appeal or the void order of the Superior Court, the respondent attorneys filed a Declaration Re: Contempt (A-60 - A-63). Respondent judge entered an Order To Show Cause Re: Contempt (A-64 -A-66) which was served upon Kerrigan.

Because of the odd even file number case assignment system of the Superior Court, the Order To Show Cause Re: Contempt came before the

Honorable J. Perry Langford, who advised the proceedings were unconstitutional and that no judgment had been entered. (A-35)

The respondent attorneys then caused the Application For Ex Parte Clarifying Order and Order (A-54-59) to be filed in the judgment book (A-54).

Then respondent Luce, Forward, Hamilton & Scripps falsified an Abstract of Judgment stating there was a $1,000.00 judgment in their favor entered against Kerrigan and that summons was personally served at or mailed to him when in fact summons had never issued and he was never a party to the proceedings mentioned in the Abstract of Judgment (A-67 - A-70)

The Abstract of Judgment was recorded and the inoperative lien is a cloud upon the title so as to interfere with financing or any potential sale of the land and being community property is also a lien on the real property of Dorothy R. Kerrigan ("Mrs. Kerrigan"). (A-46-49).

That the defamatory publications made in a court without jurisdiction that Kerrigan, an attorney has refused to pay his just debts, refused to obey court orders, etc. was libel per se. (A-40-46)

REASONS FOR GRANTING THE WRIT

I. COURT BELOW DID NOT STRICTLY OBSERVE THE LIMITS OF ITS JURISDICTION IN ALLOWING A MOTION TO DISMISS

Since the judgment below was premised on Federal Rules Civil Procedure 12(b)(6), the court below should have noted that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." **Conley v. Gibson**, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957).

In the case at bar, there is no problem in proving a case, since all the necessary facts are disclosed by exhibits (A-52, 54-70). Each exhibit was filed in the Federal District Court by the respondent attorneys and disclose that the facts are relatively simple. All exhibits were filed after all state litigation had terminated and they establish a prime facie case of liability for violation of civil rights, libel, and slander of title.

Moreover the court below in passing on the motion to dismiss decided the action is based upon an earlier state court action (A-19). It was the respondents who based their action on an earlier state court action, but they acted after all state court action had terminated as alleged in the

amended complaint, which states "this action does not relate to proceedings that has ever been before the state courts." (A-20). These and other allegations of the complaint must be construed in favor of the plaintiffs. **Scheuer v. Rhodes**, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed2d 70, 75 (2d Cir. 1975).

And § 1983 is to be given a liberal construction inasmuch as it is remedial legislation. **Birmbaum** v. **Trussell**, 371 F.2d 672, (2d Cir. 1966).

The Civil Rights Act is not to be interpreted narrowly. **Basista v. Weir**, 140 F. 2d. 74 (3rd Cir. 1965).

The court below may dismiss the complaint only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." **Hughes v. Rowe**, 449 U.S. 5, 10, 101 S.Ct. 173, 176, 66 L.Ed.2d 163 (1980).

II. THE COURT BELOW OVERLOOKED THE TWO ELEMENTS REQUIRED FOR A 1983 ACTION THAT WERE SET FORTH IN THE AMENDED COMPLAINT

The court below decided: "We have examined the record in this case, and we find that Kerrigan has failed to allege the necessary element of a 1983 action." (A-10)

The Supreme Court decided that the plain terms

of § 1983 only requires two and only two allegations in a complaint to state a cause of action under § 1983. First plaintiff must allege some person deprived him of a federal right. Second he must allege that the person who deprived him of that right acted under color of state law. **Gomez v. Toledo**, 446 U.S. 635, 640, 64 L.Ed.2d 572, 100 S.Ct. 1920 (1979).

A cause of action under 42 U.S.C. § 1983 has two elements: (1) the defendants acted under color of state law; and (2) their actions deprived a plaintiff of a constitutional right. **Parratt v. Taylor**, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

The record reflects that the defendant judge's conduct is under "color of state law" as he was clothed with the authority of the state and was purporting to act thereunder even if his conduct was not authorized by state law. **Marshall v. Sawyer**, 301 F.2d 639, 646 (9th Cir. 1962).

And the allegations of a conspiracy between the judge and the other defendants are sufficiently specific to state a claim under §1983. **Brucar v. Rubin**, 638 F.2d 987. (7th Cir. 1983).

The amended complaint states a real, direct, substantial, patient and continuing violation of plaintiffs' constitutional rights since the bogus Abstract of Judgment recorded as a lien on their real property constitutes a cloud upon the community property described in the amended complaint (A-47), but is a

cloud on any property acquired after the filing of the amended complaint and does interfere with their real property rights, to wit: "Right to acquire, enjoy, own, lease, sell, hold, and convey property without abridgement by arbitrary state action." (A-38-39).

The circumstances of this case epitomize the situation 42 U.C. §1983 was intended to furnish a procedure to remedy; for the court below to turn its back on petitioners in this case is to deny them any meaningful remedy against a real, direct, substantial, patent and continuing violation of their Fourteenth Amendment rights.

III. THE COURT BELOW MAKING ITS OWN DETERMINATION OF THE EXTENT OF JURISDICTION OF CALIFORNIA COURTS IS INCONSISTENT WITH DECISION OF THE UNITED STATES SUPREME COURT

The court below lacks inherent power to create its own rules for state Superior Court jurisdiction unauthorized by state statutes, state constitution, and procedural rules, nevertheless it ruled that a Superior Court judge can change an order of a Court of Appeals (A-10)

The considerable latitude taken by the court below to promulgate its own rules and procedures

to be followed by Judge Butler in the state Superior Court constitutes an impermissible invocation of judicial power and overturns decision of the United States Supreme Court that has decided that in determining the extent of the jurisdiction of state courts, the federal courts will follow the decisions of the state court of appeals of the state where the jurisdiction is questioned. **Forsyth v. Hammond**, 166 U.S. 506, 518, 17 S. Ct. 665, 41 L. Ed 1095; (1897); **Freeport Water Co. v. Freeport City**, 180 U.S. 587, 595, 21 S. Ct. 495, 45 L. Ed. 679 (1901); and **Collins v. Johnston**, 237 U.S. 502, 508, 35 S. Ct. 649, 59 L. Ed. 1071 (1915).

The court below granted the respondent attorneys two appeals in the California courts by its finding, when the constitution and statutes of California provide for a single appeal without further proceedings in the trial court and the judgment of the appellate court is just as binding on both parties. **Phillips v. Patterson**, 34 Cal.App.2d 481, 485, 486 (1939).

The court below not only had no power to decide that the Superior Court could modify the higher order, but under California rules of court 30 days had passed since the state Court of Appeal filed its void order, so the state court could not modify the order that the court below modified.

IV. THE COURT BELOW ERRED IN NOT FINDING JUDGE BUTLER IS NOT IMMUNE FROM SUIT

Judge Butler in his memorandum of points and authorities in support of his motion to dismiss the amended complaint alleged: "Plaintiffs cannot state a viable claim for damages against Judge Butler in this action. A judicial defendant is clearly immune from suit for civil liability" (Record page 208).

However the court below never mentioned judicial immunity in its memorandum (A-6 - 12) despite the fact it was one of the primary issues on appeal.

Judge Butler made his agreement to act **after** all state litigation had terminated. The Ninth Circuit had considered a case where the defendant judge made a private, **prior** agreement before litigation was commenced to act in favor of one party and decided there was no judicial act and no immunity. **Rankin v. Howard**, 633 F. 2d 844 (9th Cir. 1980), cert den (US) 68 L. Ed. 2d 326, 101 S. Ct. 2020; accord **Lopez v. Vanderwater**, 620 F. 2d 1229, (9th Cir. 1980) cert dism. (US) 66 L. Ed 2d 491, 101 S. Ct. 601.

Rankin analyzed the landmark case of **Stump v. Sparkman**, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978).

Dykes v. Houseman, 743 F.2d 1488, 1497 (IIth Cir. 1984) agreed with **Rankin** court's analysis of judicial immunity.

Stump, Rankin, and **Dykes** are all in agreement that if a judge act as Judge Butler did in the clear absence of all jurisdiction and in the face of clearly valid statutes and case law expressly depriving him of jurisdiction, the judge has lost his cloak of judicial immunity and is liable for all his non-judicial acts.

V. COURT BELOW ERRED IN NOT DECLARING THE PROCEEDINGS IN THE SUPERIOR COURT AFTER REMITTITUR WHICH IS THE BASIS FOR THIS ACTION CORAM NON JUDICE

As alleged in the amended complaint Judge Butler acted in the clear absence of all jurisdiction and in the face of clearly valid statutes and case law. (A-33-34).

In a Kentucky case that decided a judge was liable for false imprisonment, **Manning v. Ketcham**, 58 F.2d 948 (1932), the court said on page 949:

> "When a judge acts in the clear absence of all jurisdiction, i.e., of authority to act officially over the subject-matter in hand, the proceeding is coram non judice. In such a

case the judge has lost his judicial function, has become a mere private person, and is liable as a trespassor for the damages resulting from his unauthorized acts. Such has been the law from the days of the case of **The Marshalsea**, 10 Coke 68. It was recognized as such in **Bradley v. Fisher**, 13 Wall. (80 U.S.) 335, 351, 20 L.Ed. 646."

And in a San Diego County case **DeCourcey v. Cox** 94 Cal. 665, 668 (1892):

"If a magistrate acts beyond the limits of his jurisdiction, his proceedings are deemed to be coram non judice, and void; if he attempts to enforce any process founded on any judgment, sentence, or conviction, in such case, he thereby becomes a trespasser. (**Piper v. Pearson**, 2 Gray, 120; 61 Am. Dec. 438)."

VI. COURT BELOW PREMISED ITS DECISION ON CLEAR MISREPRESENTATIONS OF STATE COURT PROCEEDINGS NOT IN ISSUE

The court below completely ignored the limited issues represented by this appeal. The amended complaint pointed out: "It is important to note this action does not relate to proceedings pending before a state court, nor to proceedings that have ever been before the state courts." (A-20).

And the court below had no jurisdiction to sit as an United States Supreme Court and review state court cases.

The court below premised its memorandum (A-6-12) on pages of the irrelevant exhibits (30-152 and 241-280) filed by respondents in the District Court as a vehicle to raise closed issues that were res judicata.

But it is one thing for the court below to base its decision on pages of illegitimate state court exhibits, but to be free and easy with the facts disclosed by the irrelevant record is to further foresake its trust.

For example the court below in its memorandum under **FACTS** (A-8): "Kerrigan, as attorney for Carolyn Whyte, filed an action in the San Diego Superior Court against the First American Title Insurance Co. (First American) on an easement dispute."

The above "fact" is pure fiction. Mrs. Whyte filed only one title suit, an injunction and damages against the Pauls. (Record 34-49).

The Pauls' title insurance policy was issued by First American. The Pauls discovered from Mrs. Whyte's suit against them that First American had issued a defective policy claiming they had an easement from deeds of record when there were no deeds of record that created an easement. First American acquired title to the Pauls' real property in settlement of Pauls' claim against it. Then First American filed a suit against Mrs. Whyte, a complaint in intervention to establish an easement.

(Record 51-60).

Another title company caused suit to be filed against Mrs. Whyte on behalf of the Schuhs as it was negligent in its examination of the Schuhs' real property. (Record 61-63).

Mrs. Whyte filed suit against her title company as they refused to defend her on the $21,500.00 policy they issued. Because of the malicious prosecution of her by First American and its attorneys the suit had to be settled for $150,000.00 as she was afraid to appear in a courtroom (A-28). If Mrs. Whyte's title insurer had defended her as required by its policy, Kerrigan wouldn't have been required to represent her and he would not have been involved in any of the state lawsuits or the one at bar.

And the court below was not scrupulously fair or accurate or a friend of justice when it alleged: ". . .Kerrigan, as attorney for Whyte, filed two separate malicious prosecution actions against First American in the California state courts." (A-8). Again the court below relied on pure fiction, as there was one and only one lawsuit filed against First American by Mrs. Whyte (Record 30-33) and not three as claimed by the court below. (A-8).

Assume (but don't admit) Mrs. Whyte filed 5,000 state actions against First American and the respondent attorneys filed thousands of pages of state court exhibits to support their motion to dismiss the amended complaint, the cases and the exhibits would be irrelevant.

VII. THE COURT BELOW HAD NO JURISDICTION TO REVIEW, VARY, AMEND, OR MODIFY A REMITTITUR OF A STATE APPELLATE COURT OR GIVE ANY OTHER OR FURTHER RELIEF

After the state court of appeals remittitur was filed in the state Superior Court, the clerk of the Superior Court made the following entry (A-52):

> "Please be advised the Remittitur has been received from the Court of Appeal. The order is **APPEAL IS DISMISSED. Respondent** to recover costs on appeal."

The court below didn't like the remittitur of the state appeallate court, so it amended and modified it to provide that the case was returned to the Superior Court so Judge Butler could amend, vary, and modify the order of the Court of Appeal and name Luce, Forward, Hamilton & Scripps the payee of its order and to enter a judgment for $1,000.00 against Kerrigan as its order was unconstitutional and void.

The decision of the court below is not supported by any California decisions. Where the clerk of the Superior Court on receipt of a remittitur has entered a minute of a judgment of the Appellate Court in the register of actions pursuant to state law, the judgment is of record and no further action by the Superior Court is necessary. **Hampton v. Superior**

Court, 38 C 2d 652, 242 P 2d (1952).

When a cause is remanded, not for retrial, but to give effect to decision on appeal, trial court can take no further proceedings except such as are necessary to give effect to appellate court's judgment. **Snoffer v. Los Angeles**, 14 CA 2d 650, 58 P 2d 961. (1936) A lower court is bound by the findings, judgments, orders and opinions of a higher court. **Miller Estate**, 266 Cal.2d. 541 (1968). On remittitur, the trial court is bound by the directions of the appellate court and it is absolutely controlling on the jurisdiction of the trial court. **Van Diest v. Van Diest**, 266 CA 2d 541 (1968). "The judgment of the Appellate Court is as binding on the respondent as it is upon the appellant." **Phillips v. Patterson**, 34 CA| A 2d 481, 487 (1939). And jurisdiction of an appellate court cannot be divested by its irregular or improvident orders. **Ellenberger v. City of Oakland**, 76 Cal App. 2d. 828, 830 (1946)-

The word remittitur is employed to designate the judgment of the appellate court which is authenticated to the court from which the appeal is taken and corresponds to the "mandate" used in the practice of the United States Supreme Court. **Severns Drilling Co. v. Superior Court**, in and for Los Angeles County, 10 Cal App 2d 435, 60 P 2d 530, 531 (1936).

The United States Supreme Court long ago emphasized that when acting under an appellate court

mandate an inferior court "cannot vary it, or examine it for any other purpose; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded." **In re Stanford Fork & Tool Co.**, 160 U.S. 247, 255 (1895).

The case the court below relied on to authorize it to permit Judge Butler to deviate from the remittitur of the state court of appeal is **People v. Martin**, 87 Cal.App.3d 573, 579-80, 151 Cal. Rptr. 141, 143-44 (1978). (A-11) The only case cited.

The **Martin** case is significantly distinguishable as the matter was remanded to the trial court for a limited new trial on the existence of admitted prior conviction and resentencing. The limited new trial was part of the same criminal proceedings and the effect of the remittitur is to revest the trial court with jurisdiction of the same proceedings.

Since the defendant attorneys were dissatisfied with the judgment rendered by the Court of Appeal, their remedy was to petition for a rehearing or modification of the judgment within the time allowed by law and before the remittitur had issued to the Superior Court. **Wong v. Title Insurance Co.**, 91 Cal.App.2d 1, 3 (1952).

VIII. COURT BELOW HAD NO JURISDICTION TO REVIEW AND REFORM AN ORDER OF THE STATE COURT OF APPEAL

The court below ruled: "'The California Court of Appeal imposed a sanction of $1,000 against "appellant's attorney, Walter F. Kerrigan,..."' (A-9). And: "The California Court of Appeals... imposed a sanction against Kerrigan . . ." (A-8).

It is not necessary to dwell on the fact that the court below has no jurisdiction to sit as a U.S. Supreme Court and review and reform and order of a state appellate court.

As a matter of law the court below is required to accept the order entered by the state appellate court.

Under California law the order in question is void because due process requires that certain basic procedural protection be afforded to an attorney before the state deprives him of $1,000.00, as his right to pursue his chosen profession free from arbitrary state interference is protected by the due process clauses of both the state and federal constitutions. Therefore Kerrigan should have been given a hearing. He should have received a written statement "in detail" of the reasons for the penalty (California Code of Civil Procedure, § 128.5) **In re Marriage of Flaherty**, 34 Cal.3d 637, 651-654 (1982).

Also there were two petitions filed by different parties each requesting that Kerrigan pay $1,000.00. The Rules of Court, Rule 26 (a) makes no provision who is to be awarded payments. The court could have designated Mrs. Whyte, State of California, Clerk of Court, or anyone else to receive the payment, if it had complied with the due process requirement of the state and federal constitutions before it entered its order.

IX. THE COURT BELOW ERRED IN NOT FINDING POST-PROCEEDING LIBEL

Judge Butler and the respondent attorneys caused to be published documents (A-54-70) which show a lack of character, total disregard of professional ethics, and that an attorney has been disloyal to the best interests of his client, as alleged in the amended complaint (A-42-43).

The respondents raise the defense that the above publications were made in the course of a judicial proceedings and are therefore privileged (Record 189).

The court below should have decided that Judge Butler acted in the clear absence of all jurisdiction as the proceeding where the documents were filed was coram non judice, so there was no judge, no proceeding, no privilege.

The privilege is lost when the proceedings are

over even if the statements were made in a courtroom, as "obviously these statements were not made in the course of judicial proceedings" **Rogers v. Courier Post Co.**, 2 N.J. 393 (1949).

Lack of jurisdiction destroys the privilege of defamatory allegations or statements made in judicial proceedings. **Thorn v. Blanchard**, 5 Johns (NY) 508 (1809) and **Jones v. Brownalee**, 161 Mo. 258, 61 S W 795 (1901). **Thorn** quoted with approval a 1591 English case.

And in California publications made during the pendency of a civil action accusing attorneys with illegal conduct were not privileged as the publications were not made in the furtherance of litigation. **Bradley v. Hartford Accident And Indemnity Company**, 30 Cal.App.3d 818 (1973).

X. THE COURT BELOW ERRED IN NOT FINDING THE LIEN WAS A SLANDER OF TITLE

The court below made the correct finding when it decided "... Luce, Forward recorded an abstract of judgment against Kerrigan which placed a lien on his real property." (A-9). The court should have also found that the lien was against Mrs. Kerrigan's real estate, as the real property described in the amended complaint was community real estate (A-47)

The court below erred in not finding that Luce,

Forward falsified the abstract of judgment before it was recorded. (A-67-70).

The court below erred in not finding that when Luce, Forward certified the abstract of judgment, no judgment had ever been entered and/or no summons had ever issued. (A-47-48)

And the court below erred in not applying the substantive law of California that recording an inoperative abstract of judgment is slander of title. **Corey v. Hecker**, 202 Cal. 22 (1928).

XI. COURT BELOW ERRED IN FAILING TO FIND ALL CLAIMS FILED AGAINST JUDGE BUTLER WERE VALID WITHOUT FILING CLAIM WITH COUNTY

Judge Butler in his motion to dismiss the amended complaint alleges 42 U.S.C. § 1983 is not subject to California Government Code 910 et seq, but the pendant claims are not valid as they do not "allege the presentation of a proper claim for damages by plaintiff prior to the institution of this action." (Record 212-213).

The court below erred in not finding that since Judge Butler had no jurisdiction when he acted no claim had to be filed with the County or anyone else.

The court below erred in not following a ruling of the California Supreme Court that a judicial officer having no jurisdiction of a person is acting in his individual capacity. **Inos v. Winspear**, 18 Cal. 397

(1861). Or did it follow the U.S. Supreme Court decision in **Ex Parte Young**, 209 U.S. 123 (1907), that the attempt of a state officer to proceed without authority does not affect the state in its sovereign or governmental capacity, and it is an illegal act and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct.

A California case, **Franklin v. Municipal Court**, 26 Cal.App.3d 884 (1972), when a judge in his individual capacity was in possession of a revolver and had refused to return it, a claim was stated against the judge in his individual capacity for conversion, which was not barred by doctrine of judicial immunity nor by plaintiff's failure to file a claim with City and County of San Francisco prior to filing suit.

In **Alma W. v. Oakland Unified School District**, 123 Cal.App.3d (1981) a student had allegedly been raped by a school district custodian on the school's premises on a Friday afternoon in the custodian's office. The court held that the employee did not act in the course of his employment as the custodian's action was promoted by wholly personal motivation and was clearly not required or incidental to his duties as a school custodian. The fact that the offense occurred during working hours did not make the custodian's duties incidental tc his employment, although his use of the janitor's

office furnished opportunity for his action, that fact did not impute liability to the district. And however brief a space of time the public entity employee ceased to serve his principal, he alone is responsible for his acts during the period of such cessation.

Both Butler and the custodian were public entity employees. When they acted Butler may have been wearing his judicial robes and the custodian may have been wearing a uniform. Both acted during working hours. The custodian used his office and Butler the courthouse. Both were prompted by wholly personal motivation that was clearly not required or incidental to their duties. And both of them for a brief space of time ceased to serve their principal. Liability to the school district is not imputed by the custodian and liability to the County is not imputed by Butler. Both are alone responsible for their acts during the period of such termination.

XII. COURT BELOW HAS NO DISCRETION TO AWARD ATTORNEY'S FEES AND DOUBLE COSTS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE, RULE 38

Court below states: "Rule 38, Federal Rules of Civil Procedure grants this court discretion to award attorneys fees and double costs as a sanction against the filing of a frivolous appeal."

The court's reliance on F.R.C.P. 38 is misplaced as the rule is entitled "JURY TRIAL OF RIGHT". And nowhere in the body of the rule is there any mention of frivolous appeals, attorneys fees, double costs, or sanctions.

XIII. COURT BELOW LACKED AUTHORITY TO IMPOSE §1927 SANCTIONS AGAINST ATTORNEY AS THERE ARE NO FINDINGS THAT THE ATTORNEY'S CONDUCT WAS WILLFUL, INTENTIONAL, RECKLESS OR IN BAD FAITH

The decision of the court below is directly contrary to its own subsequent precedent that the rule of law of the Ninth Circuit is that sanctions may not be imposed under §1927 without an express finding that counsel acted willfully, intentionally, recklessly, or in bad faith. **United States v. Austin**, 749 F. 2d 1407, 1408 (9th Cir. 1984). **Austin** cites earlier cases of the Ninth Circuit in accord.

Court below claimed the appeal is frivolous, but that in itself does not establish bad faith. **United States v. Blodgett**, 709 F. 2d 608, 610 (9th Cir. 1983).

The court below makes other allegations to support its sanctions such as the case has been burdensome and costly to the litigants and caused them unnecessary trouble and expense, etc. But all their findings does not support sanctions under §1927 in the Ninth Circuit. And §1927 should be

strictly construed because it is penal in nature. **Monk v. Roadway Express, Inc.**, 599 F. 2d 1378, 1382 (5th Cir. 1979).

XIV. COURT BELOW WAS NOT AUTHORIZED TO IMPOSE SANCTIONS FOR AN ATTORNEY'S CONDUCT IN STATE COURTS

Incredibly the court below based its 1927 sanctions on Kerrigan's alleged conduct in proceedings in the California courts. (A-9). It is axiomatic when the court below relied on 1927, it was bound by the plain language of 1927 that the attorney's acts must be in "any court of the United States or any territory thereof". And no sanctions were ever entered against Kerrigan in the state courts and as noted before the **Flaherty** due process requirment of the California Supreme Court had not been satisfied.

And the court below erred in reviewing actions of state courts with respect to attorney's discipline, since federal jurisdiction to review such decisions lies exclusively in the United States Supreme Court by writ of certiorari to the state court that entered the sanctions. **MacKay v. Nesbitt**, 412 F. 2d 846 (9th Cir. 1969). Also **Brown v. Board of Bar Examiners**, 623 F. 2d 605, 601-10 (9th Cir. 1980).

XV. COURT BELOW ERRED IN NOT IMPOSING §1927 SANCTIONS FOR DOUBLE COSTS AND ATTORNEY'S FEES AGAINST SELTZER, CAPLAN WILKINS & McMAHON

SELTZER, CAPLAN WILKINS & McMAHON representing some of the respondents, completely ignored the limited issues presented by the complaint, filed pages of irrelevant documents citing opinions and dozens of cases unrelated to the real issues raised by the complaint and in seeking to resurrect state court matters long since finally concluded. (Record 23-152). And in its motion to dismiss the amended complaint included the first irrelevant documents filed plus pages of additional irrelevant documents citing opinions and dozens of cases unrelated to the real issues in the amended complaint as an additional vehicle to re-raise closed issues. (Record 241-280).

Reading the memorandum of the court below (A-6-12) nothing could be clearer that because respondents' counsel has so overcomplicated, confused, and misunderstood the matters raised by the complaint and amended complaint, that they have created a lawsuit that is expensive and time consuming to the courts and to the litigants alike.

Counsel's course of conduct in filing pages of irrelevant documents with irrelevant opinions and citing cases unrelated to the real issues without a

shred of rational bases, and in seeking to resurrect matter long since finally concluded has been irresponsible and an abuse of process.

The conduct passed the border of advocacy and entered the realm of harassment and constitutes the requisite bad faith and intentional misconduct for which sanctions under Title 28, United States Government Code §1927 are appropriate. **Barnd v. City of Tacoma**, 664 F.2d 1339, 1343 (9th Cir. 1982).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

_____

Walter F. Kerrigan
Attorney for Walter F. Kerrigan,
Petitioner pro se
Attorney for Dorothy R. Kerrigan,
Petitioner

STATEMENT OF RELATED CASES

Pursuant to Rules of the United States Supreme Court, Petitioner knows of no cases that are related to this appeal which are now pending before this court.

DATED: March , 1985.

_____

Walter F. Kerrigan

APPENDIX

_✓_FILED
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OCT 6 1983

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY _____DEPUTY

_____FILED
_X_ENTERED
_____LODGED
_____RECEIVED

OCT 7 1983

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY_____DEPUTY

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Attorneys for Defendants
LUCE, FORWARD, HAMILTON & SCRIPPS,
STEVEN S. WALL and JULIE A. GREENBERG

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WALTER F. KERRIGAN and
DOROTHY R. KERRIGAN,

Plaintiffs,

vs.

LUCE, FORWARD, HAMILTON & SCRIPPS,
a professional corporation; STEVEN W. WALL,
JULIE A GREENBERG, SCALES, PATTON,
ELLSWORTH & CORBETT,
a professional corporation,
LUKE R. CORBETT, RALPH E. HUGHES,
MICHAEL E. WEXLER, ERWIN & ANDERHOLT,
a professional corporation,
DAVID M. FRANKLIN, MARINOS,
STYN & STUDEBAKER, a professional
corporation, RONALD L. STYN,
JANA W. GREEN, EDWARD T. BUTLER,

Defendants.

Case No. 83-0410-G(H)

ORDER ON MOTIONS TO DISMISS

The motions of defendants LUCE, FORWARD, HAMILTON & SCRIPPS, STEVEN S. WALL, JULIE A. GREENBERG, DAVID M. FRANKLIN, ERWIN & ANDERHOLT, MARINOS, STYN & STUDEBAKER, RONALD L. STYN, JANA W. GREEN, EDWARD T. BUTLER, SCALES, PATTON, ELLSWORTH, & CORBETT, LUKE R. CORBETT, RALPH E. HUGHES, MICHAEL E. WEXLER, ERWIN & ANDERHOLT and DAVID M. FRANKLIN to dismiss the complaint herein came on regularly for hearing on September 6, 1983 in Courtroom 7 of the above-entitled Court, the Honorable Earl B. Gilliam, Judge Presiding. Defendants LUCE, FORWARD, HAMILTON & SCRIPPS, STEVEN S. WALL and JULIE A. GREENBERG appeared through their attorneys, SELTZER CAPLAN WILKINS & McMAHON, by REG A. VITEK; defendants MARINOS, STYN & STUDEBAKER, RONALD L. STYN and JANA W. GREEN appeared through their attorneys, MARINOS, STYN & STUDEBAKER, by RONALD L. STYN; defendant EDWARD T. BUTLER appeared through his attorneys, SAN DIEGO COUNTY COUNSEL, by CHARLES VIVIANO; defendants SCALES, PATTON, ELLSWORTH & CORBETT, LUKE R. CORBETT, RALPH E. HUGHES, MICHAEL E. WEXLER, ERWIN & ANDERHOLT and DAVID M. FRANKLIN

appeared through their attorneys, GIBSON & KENNERSON, by DOUGLAS A. GLASS; and plaintiffs WALTER F. KERRIGAN and DOROTHY R. KERRIGAN appeared through their attorney, WALTER F. KERRIGAN.

The Court having received and considered pleadings and argument in support of and in opposition to the motions to dismiss, and the matter having been argued and submitted for decision, it is hereby ordered that the motions to dismiss are granted. Plaintiffs' Amended Complaint is hereby dismissed, without leave to further amend.

DATED: 10/5/83

EARL B. GILLIAM
Judge of the United States District Court

APPROVED AS TO FORM:

WALTER F. KERRIGAN
Attorney for Plaintiffs
WALTER F. KERRIGAN pro se and
DOROTHY R. KERRIGAN

SELTZER CAPLAN WILKINS & McMAHON

By
REG A. VITEK
Attorneys for Defendants
LUCE, FORWARD, HAMILTON & SCRIPPS,
STEVEN S. WALL and JULIE A GREENBERG

MARINOS, STYN & STUDEBAKER

By_____
RONALD L. STYN
Attorneys for MARINOS, STYN
& STUDEBAKER, RONALD L. STYN and
JANA W. GREEN

SAN DIEGO COUNTY COUNSEL

By_____
CHARLES VIVIANO
Attorney for EDWARD T. BUTLER

GIBSON & KENNERSON

By_____
DOUGLAS A. GLASS
Attorneys for SCALES, PATTON,
ELLSWORTH & CORBETT, LUKE R.
CORBETT, RALPH E. HUGHES,
MICHAEL E. WEXLER, ERWIN &
ANDERHOLT and DAVID M. FRANKLIN

FILED
DEC 17 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS
CA No. 83-6265
DC No. 83-0410-G(H)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER F. KERRIGAN and,
DOROTHY R. KERRIGAN,

Plaintiffs-Appellants,

vs.

LUCE, FORWARD, HAMILTON & SCRIPPS, a professional corporation, STEVEN W. WALL, JULIE A GREENBERG, SCALES, PATTON, ELLSWORTH & CORBETT, a professional corporation, LUKE R. CORBETT, RALPH E. HUGHES, MICHAEL E. WEXLER, ERWIN & ANDERHOLT, a professional corporation, DAVID M. FRANKLIN, MARINOS, STYN & STUDEBAKER, a professional corporation, RONALD L. STYN, JANA W. GREEN, and EDWARD T. BUTLER,

Defendants-Appellees.

MEMORANDUM**

Appeal from the United States District Court
for the Southern District of California

Hon. Earl B. Gilliam, District Judge Presiding
Argued and submitted September 4, 1984

Before: HUG and POOLE, Circuit Judges, and SOLOMON,* District Judge.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the **Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit, save as provided by Rule 21(c).

Walter Kerrigan (Kerrigan), an attorney, and his wife, Dorothy Kerrigan, appeal an order dismissing their action against a number of San Diego lawyers and law firms and against a California Superior Court Judge.

The Kerrigans filed this action under 42 U.S.C. §1983 in which they charge that the defendants conspired to violate Kerrigan's constitutional rights. They also seek damages for libel and slander of title because of the recording of a $1,000 sanction assessed against Kerrigan in his capacity

as attorney in a frivolous appeal of a state court action. The district court dismissed the action for failure to state a claim on which relief may be granted. The Kerrigans appeal.

We find the appeal frivolous and affirm. We assess attorney fees and double costs against Walter Kerrigan.

FACTS

Kerrigan, as attorney for Carolyn Whyte, filed an action in the San Diego Superior Court against the First American Title Insurance Co. (First American) on an easement dispute. Whyte, by stipulation, dismissed some of her claims. After a trial on the remaining claims, the Superior Court held against Whyte and entered a judgment on both the claims that were tried and the claims that were dismissed on stipulation. Kerrigan, on behalf of Whyte, appealed. The California Court of Appeal affirmed.

Shortly thereafter, Kerrigan, as attorney for Whyte, filed two separate malicious prosecution actions against First American in the California state courts. The trial court, on a demurrer, dismissed the actions without leave to amend on the ground that a malicious prosecution suit cnnot be based on a stipulated dismissal.

Kerrigan also had filed a second malicious prosecution suit against First American and based it on

the same facts as those in the first suit. The trial court dismissed the suit without leave to amend.

Kerrigan appealed both dismissals. The California Court of Appeal affirmed the first dismissal, characterizing the suit as a "sham proceeding." When Kerrigan continued to pursue the second appeal, the California Court of Appeal dismissed it and imposed a sanction of $1,000 against "appellant's attorney, Walter F. Kerrigan, for taking this frivolous appeal."

The order did not state to whom the $1,000 should be paid. The appellate court remanded the case to the trial court. In an application by counsel for appellees, appellees alleged that Kerrigan had refused to pay the $1,000 without an order stating to whom the money should be paid. They petitioned the trial court for an order designating Luce, Forward, Hamilton & Scripps (Luce, Forward), attorneys for the appellees, as the payee of the award. When Kerrigan failed to pay the sanction award, Luce, Forward recorded an abstract of judgment against Kerrigan which placed a lien on his real property.

Kerrigan and his wife then filed this action in the district court against the lawyers and the law firms which represented the defendants in the three state court actions and also against Edward T. Butler, Judge of the California Superior Court, San

Diego County. Kerrigan alleges that all of the defendants conspired to violate his First and Fourteenth Amendment rights through the imposition of sanctions, all in violation of 42 U.S.C. §1983. They also asserted claims for libel and slander arising out of the recording of the abstract of judgment.

The district court dismissed the action because both the original and amended complaints failed to state a claim on which relief could be granted.

We have examined the record in this case, and we find that Kerrigan has failed to allege the necessary elements of a 1983 action. Mere statements that the defendant acted illegally or that Kerrigan was entitled to "Freedom from coercion and intimidation," the "Right to due process of law," the "Right to equal protection of law," and other such conclusionary remarks do not satisfy the requirement of specificity for a 1983 action. Other parts of the record failed to remedy the inadequacies of the complaint.

The claim against Judge Butler also lacks any merit. Kerrigan does not allege facts but merely conclusions, and the record reveals that the true facts are contrary to Kerrigan's conclusionary statements. Judge Butler designated the payee after the Court of Appeals remanded the case to the Superior Court. When the Court of Appeals issued the remittitur, it no longer had jurisdiction and all subsequent proceedings were properly before the

Superior Court. **People v. Martin**, 87 Cal.App.3d 573, 579-80, 151 Cal.Rptr. 141, 143-44 (1978).

The district court dismissed the claims for libel based on the facts asserted in the 1983 claim and dismissed the claim for slander of title based upon the filing of the abstract of judgment.

Page 4 - MEMORANDUM

Rule 38, Federal Rules of Civil Procedure, grants this court discretion to award attorneys fees and double costs as a sanction against the filing of a frivolous appeal. When an attorney multiplies the proceedings in any case before a United States court unreasonably and vexatiously, the court may require him "to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. §1927 (1980).

We are reluctant to assess costs against any party, particularly one appearing pro se, even though that party is an attorney, but the facts in this case require it. Kerrigan has made serious allegations, which lack any merit, against many lawyers and a judge, and he has filed this action based upon an earlier state court action, which both trial and appellate courts have dismissed. The California Court of Appeals characterized one appeal as "a sham proceeding" and in another case imposed a $1,000 sanction against Kerrigan "for taking this frivolous appeal."

Kerrigan's conduct in this case has been both

burdensome and costly to the litigants and has caused them unnecessary trouble and expense. We, therefore, award $250.00 attorney fees and double costs to Edward T. Butler, $250.00 attorney fees and double costs to Luce, Forward, Hamilton & Scripps, and $250.00 attorney fees and double costs to Scales, Patton, Ellsworth & Corbett. Kerrigan is directed to pay these amounts to the clerk of the United State Court of Appeals for the Ninth Circuit within thirty days of the filing of this memorandum.

AFFIRMED.

_X_ FILED
_____ ENTERED
_____ LODGED
_____ RECEIVED
JUN 29 1983
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY_____ DEPUTY

Walter F. Kerrigan
2707 Hartford Street
San Diego, CA 92110
Telephone: (619) 276-2788
Attorney for Plaintiff Walter F. Kerrigan, pro se
Attorney for Plaintiff Dorothy R. Kerrigan

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL ACTION NO. 83-0410-(G)(H)
WALTER F. KERRIGAN and
DOROTHY R. KERRIGAN

VS.

LUCE, FORWARD, HAMILTON & SCRIPPS, a professional corporation; STEVEN W. WALL, JULIE A. GREENBERG, SCALES, PATTON, ELLSWORTH & CORBETT, a professional corporation; LUKE R. CORBETT, RALPH E. HUGHES, MICHAEL E. WEXLER, ERWIN & ANDERHOLT, a

professional corporation; DAVID M. FRANKLIN, MARINOS, STYN & STUDEBAKER, a professional corporation; RONALD L. STYN, JANA W. GREEN, EDWARD T. BUTLER

AMENDED COMPLAINT

CIVIL RIGHTS

Jury Trial Demanded

PLAINTIFFS' ORIGINAL COMPLAINT
JURISDICTION

Jurisdiction is vested in this court under and by virtue of Title 28 of the United States Code, §1343. This action arises under the United States Constitution particularly under the provisions of the First and Fourteenth Amendment to the Constitution, and particularly under 42 United States Code §1983 with pendent jurisdiction and state claims for Libel and Slander of Title.

I. PARTIES

A. Plaintiffs

1. At the time of events giving rise to this Complaint, Plaintiff, Walter F. Kerrigan ("Kerrigan") is an

adult citizen of the United States of America and is a resident of San Diego County, California. He is a self-employed attorney duly admitted to practice law in New York, Indiana, Illinois, and is a member of the State Bar of California, with active membership number 55278.

2. Plaintiff, Dorothy R. Kerrigan ("Mrs. Kerrigan") is an adult citizen of the United States of America and is a resident of San Diego County, California, and the wife of the other Plaintiff.

B. Defendants

3. Defendant Luce, Forward, Hamilton & Scripps ("Luce") is a California professional corporation. On information and belief, Luce joined and participated in the wrongful conduct and civil conspiracy complained of herein by, among other acts, coordinating the activities of the other defendant conspirators, and by making its resources available to the defendants. On information and belief, certain of the defendants may have been employed by, received money from, or acted on behalf of this corporation when committing some or all of the actions alleged herein. And on information and belief, may have been employed and received money to act on behalf of some of the defendants.

4. On information and belief, defendant Steven W. Wall ("Wall") is a licensed and practicing attorney of the State of California. Wall provided guidance, support, advice and encouragement to the

other defendant conspirators and personally participated in the wrongful conduct complained of below.

5. On information and belief, defendant Julie A. Greenberg ("Greenberg") is a licensed and practicing attorney of the State of California. Greenberg provided guidance, support, advice and encouragement to the other defendant conspirators and personally participated in the wrongful conduct complained of below.

6. Defendant Scales, Patton, Ellsworth & Corbett ("Scales") is a California professional corporation. On information and belief, Scales joined and participated in the wrongful conduct and civil conspiracy complained of herein. On information and belief, certain of defendants may have been employed by, received money from, or acted on behalf of this corporation when committing some or all of the actions alleged herein. And on information and belief some of the defendants may have been employed and received money to represent Scales.

7. On information and belief, defendant Luke R. Corbett ("Corbett") is a licensed and practicing attorney of the State of California. On information and belief, Corbett conspired, combined, agreed and acted in concert with the other defendants and sanctioned the wrongful conduct complained of below.

8. On information and belief, defendant Ralph E.

Hughes ("Hughes") is a licensed and practicing attorney of the State of California. On information and belief, Hughes conspired, combined, agreed and acted in concert with the other defendants and sanctioned the wrongful conduct complained of below.

9. On information and belief, defendant Michael H. Wexler ("Wexler") is a licensed and practicing attorney of the State of California. On information and belief, Wexler conspired, combined, agreed and acted in concert with the other defendants and sanctioned the wrongful conduct complained of below.

10. Defendant Erwin & Anderholt ("Erwin") is a California professional corporation. On information and belief, Erwin joined and participated in the wrongful conduct and civil conspiracy complained of herein, and conspired, combined and sanctioned the wrongful conduct complained of below. And on information and belief was represented by some of the defendants and some of the defendants may have been employed by, received money from, or acted on behalf of this corporation when committing some or all of the actions alleged herein.

11. On information and belief, defendant David M. Franklin ("Franklin") is a licensed and practicing attorney of the State of California. On information and belief, Franklin joined and participated in the wrongful conduct and civil conspiracy complained

of herein, and conspired, combined and sanctioned the wrongful conduct complained of below.

12. Defendant Marinos, Styn & Studebaker ("Marinos") is a California corporation. On information and belief, Marinos joined and participated in the wrongful conduct and civil conspiracy complained of herein by, among other acts, coordinating the activities of the other defendant conspirators, and by making its resources available to the defendants. On information and belief, some of the defendants may have been employed by, received money from, or acted on behalf of this corporation when committing some or all of the actions alleged herein. And on information and belief, may have been employed and received money to act on behalf of one of the defendants.

13. On information and belief, defendant Ronald L. Styn ("Styn") is a licensed and practicing attorney of the State of California. Styn provided guidance, support, advice and encouragement to the other defendant conspirators and personally participated in the wrongful conduct complained of below.

14. On information and belief, Jana W. Green ("Green") is a licensed and practicing attorney of the State of California. On information and belief, Green conspired, combined, agreed and acted in concert with the other defendants and sanctioned the wrongful conduct complained of below.

15. Defendant Edward T. Butler ("Butler"), at all times pertinent was a judge of the Superior Court of California, County of San Diego, and was an agent of the State of California. Butler joined and participated and conspired, combined and sanctioned the civil conspiracy complained of below. Butler acted without jurisdiction of the person or subject matter and acted in the clear absence of all jurisdiction and acted in the face of clearly valid statutes and case law of the State of California expressly depriving him of all jurisdiction.

16. Other persons who acted in concert with the named defendants as co-conspirators in carrying out the acts complained of also include certain unnamed persons (the "conspirators") who are not now parties to this suit.

II. INTRODUCTION

Plaintiffs do not seek to relitigate matters previously decided in the state courts, nor to obtain a review of any state court judicial decision as all matters are res judicata.

Plaintiffs recognize and favor sanctions to avoid prosecuting frivolous and sham appeals.

Since the instant action arises out of the use of real property and malicious prosecution for recording a lis pendens it will be necessary to give a brief

summary of the prior state court litigation. It is important to note this action does not relate to proceedings pending before a state court, nor to proceedings that have ever been before the state courts. Therefore there is no need to give a detailed summary of any state court litigation, as anyone who can read can verify the atrocious and outrageous miscarriage of justice mentioned below by examining the files pertaining thereto that repose in the California courts.

17. In 1973 the home of Mrs. Whyte (Lot 24) was struck by her next door neighbor Zacharias (Lot 23). The impact did considerable structural damage, which was subsequently repaired by extensive and costly remodeling. As a result, Mrs. Whyte, through her attorney, Kerrigan (one of the Plaintiffs herein), demanded Zacharias stop using her property. Zacharias complied with this demand.

18. In 1975 Zacharias sold Lot 23 to Paul. Paul used the paved area on his lot to collect lumber, wooden poles, furniture, pieces of junk, that resulted in a citation by the Board of Health and a clean up.

19. On or about April 2, 1977, Paul began to drive across Whyte's property in spite of her demand that he not do so. Paul claimed that he had the right to use part of her property.

20. Whyte, fearing additional property damage and injury and possible loss of life, requested Kerrigan to help her.

21. Kerrigan considered himself qualified to represent Whyte. He was a title attorney for Chicago Title & Trust Company for five years receiving his early training from one of the outstanding real estate experts, Robert Kratovil, professor, author of **Real Estate Law** and many other books and publications about title and other real estate problems.

22. Kerrigan has examined and filed numerous real estate lawsuits. Immediately after filing suit he records a lis pendens or files same if the land is registered with the Registrar of Land Titles. Kerrigan knows that he would be guilty of malpractice if he did not file a lis pendens as one of the purposes of lis pendens is avoidance of endless litigation of property rights precipitated by transfers of interest; this end is achieved by conclusively binding one who obtains an interest in the property during the pendency of a suit affecting it to the result of that litigation as if he had been a party from the outset, and, in this respect, filing of lis pendens is designed to protect plaintiff from third persons who might acquire, during pendency of litigation, interest in subject matter of litigation such as would preclude court from granting plaintiff the requested relief. And another purpose of doctrine of lis pendens is to protect purchasers by giving them notice that land which they are buying might be affected by judgment, later entered in a pending action, by which they would be bound.

23. Kerrigan is an easement expert. He had to take an appeal to prevent a driveway by prescription. **Piper v. Warren**, 210 N.W8.2d 71 (Illinois 1965).

24. Kerrigan had represented three savings and loan associations, was a director of a bank, was a director of a savings and loan association, and director of Attorneys' Title Guaranty Fund, Inc. ("ATGF").

ATGF is a title insurer owned, controlled and operated by Illinois attorneys. ATGF is certified by the Illinois State Bar Association. Fund members are able to provide more comprehensive real estate service for their clients by issuing title insurance policies themselves rather than having to hand over the real estate practice to a commercial title insurance company.

Kerrigan, an ATGF lawyer-shareholder, is authorized to issue title insurance policies on Illinois real property which bind ATGF. The ATGF staff evaluates risks in excess of $250,000.00 dollars; however, before the policy may be issued, each member undertakes the responsibility to examine the title to property to determine its insurability.

25. Kerrigan examined Whyte's grant deed and it did not mention an easement. Her title policy stated there was a 15 foot easement created by various deeds. However, anyone with eyes to see would not find a 15 foot driveway easement and could agree

with the subsequent findings of the trial judge:

> ". . .it's apparent to me that the developers of this property invited controversy. They created an inflammatory situation when they laid out this driveway. . ."

Or they might agree with subsequent verified pleadings of the neighbors:

> ". . .that the area described. . .is an abandoned street, and is not an improvement of any sort whatsoever. . .is extremely steep and narrow, and is of no use whatsoever to the individual owners, except as it may be used by said individual real property holders as part of the parcels of real property owned by each of them. . .that the use of said area for driveway purposes, or for vehicular traffic of any sort, would creat an unsafe condition amounting to a nuisance."

26. On April 5, 1977, Whyte and Kerrigan went to her title insurance office to notify the insurance company, Title Insurance and Trust Company ("TI"), of Paul's claim against her property and to seek assistance in the matter.

27. Whyte's title company gave Kerrigan false information and failed to cooperate in providing documents requested or in taking action to defend her title of record. Kerrigan was required to make a

title search of the six lots in question in the Recorder's Office. This examination disclosed that there were no deeds creating an easement, but an easement had been created in 1963 by deeds of trust, but the easement had been extinguished in 1975 when the loans securing the deeds of trust had been paid. He also discovered that TI had negligently performed their title search on adjoining real property so that Whyte's neighbors had also erroneously assumed that they had easements created by various deeds. On subsequent sales Safeco Title Insurance Company and First American Title Insurance Company ("First") relied on the negligent title search of TI and had issued defective title policies.

28. Whyte filed suit against TI for the breach of its duty of good faith and fair dealing by failing to defend her when it had a legal and contractual obligation to do so. Since Kerrigan was a material witness to the fraud and wrongful claim practices of TI and did not want to be both a witness and an advocate in the same trial, other attorneys were substituted. Whyte was suffering great emotional distress and from physical injuries caused by the malicious prosecution mentioned below and was afraid to appear in court and would not appear, so her claim against TI had to be settled for $150,000.00.

29. Since TI did not act, Kerrigan was forced to file

an injunction action on behalf of Whyte against the Pauls. First acquired the property and substituted as a party. The owners of the property insured by Safeco filed suit against Whyte. The cases were consolidated.

30. The trial court failed to address the rule of law and relied on many ill-conceived conclusions and insisted that an easement could not be treated by a deed of trust when he was advised that California law clearly states that an easement can be created by deed, deed of trust, will, lease, and contract (written or oral).

31. The trial court would not consider the chains of title from a title company on each parcel, but relied on numerous illegitimate considerations such as the ridiculous secret intentions of the builders that they were supposed to comply with the city off-street parking ordinances, but didn't want to go further west with the project as it is planted all the way west to the alley with species from all over the world: palms, pines, acacias -- "it was like Balboa Park." (Mrs. Zacharias, a witness of First, stated the alley end of the lot was leveled off and there wasn't vegetation there, but mostly weeds).

32. The Court of Appeal issued an unpublished opinion that completely failed to address the rule of law, i.e., the "applicable" legal authorities, statutes, and case law, thereby denying Whyte her "right" of

appeal. The blind reliance on their own decision of **Kytasty v. Godwin** (1980) 102 Cal App 3d 763 (Scales was one of the attorneys for a party) was judicial error. **Kytasty** is based on the clear falsification of the law finding both an express and an implied easement in the identical subject matter which is not supported by legal authority. Miller & Starr **Current Law of California Real Estate** (1977) Vol. 3, p. 299, para. 18:22:

> "By definition, when an easement is established by implication, nothing is recorded that would disclose its existence to a person dealing with the servient tenement."

33. And **Kytasty** did not square with the recording statutes finding that Matthews' and Kytasty did not have knowledge of the easement in a trust deed when Civil Code §1212 provides that every recorded conveyance gives notice of its contents.

34. Despite all of the above proceedings the unsafe conditions of the real estate continue to be detrimental to public health, safety and welfare. On information and belief no motor vehicle has used any of the parcels of real estate for more than six (6) years, but the intentional or negligent enforcement of the City of San Diego off-street parking regulations §101.0800 and 101.0814 by the City in 1963 caused the damage and required the litigation. To date the property owners are still in violation of the ordinance and fail to afford adequate protection of

all the property interests, or provide the off-street parking that the public is supposed to have.

35. When Whyte filed the injunction action heretofore mentioned, she recorded a lis pendens authorized by Code of Civil Procedure §409 to avoid endless litigation of property rights. By law this act was an absolute privilege.

36. Endless litigation was not avoided as a cross-complaint was filed against her because she recorded the lis pendens. The cross-complaints never exercised their right to file a motion to expunge the lis pendens as provided by Code of Civil Procedure §409.1.

37. Whyte made several motions heard before several judges including Butler and filed a petition with the Court of Appeal to dismiss the lis pendens cross-complaint action, but both courts refused to dismiss the illegal cross-complaint.

38. Whyte filed a trial brief explaining when the illegal cross-complaint should be dismissed and only have a trial on the real estate matters, but he refused to comply with the law.

39. After two days of malicious prosecution on the lis pendens matter, Whyte became too ill to continue with the trial. The judge granted a recess. At the recess she was advised if she would dismiss part of her claim the cross-complaint for damages would be dismissed and the recording of the lis pendens would no longer be an "issue".

40. Whyte and the cross-complainants entered into a stipulation to dismiss, each party to pay their own costs.

41. The malicious prosecution caused Whyte to suffer severe mental anguish, emotional distress, and physical illness and caused her to spend several months in the hospital, the effects of which continue in the present.

42. Because of the intentional infliction of mental distress, Whyte filed suit against First because of their malicious prosecution. The trial court sustained First's general demurrer, claiming a stipulation to dismiss was not a favorable termination. The court failed to address the rule of law and relied on **Paskle v. Williams**, (1931) 214 Cal 482. The case was not in point as the Code of Civil Procedure had been amended on cross-complaints. Also in **Paskle** there was not only probable cause but also legal cause.

The court refused to consider California Supreme Court decisions directly on point. **Kinsey v. Wallace**, (1868) 36 Cal.462. **Kinsey** like Whyte was a case where the underlying action was also filed without probable cause. The court decided that a stipulation to dismiss signed by both parties and providing that each party pay their own costs, is such a determination of the action in favor of the underlying defendant as will enable him to maintain an action for malicious prosecution.

43. Whyte filed an appeal and the Court of Appeal failed to address the rule of law, and in an unpublished decision decided:

> "...First American was served with this malicious prosecution complaint within a few weeks after the trial court announced its intended decision in the underlying litigation and before any finding of fact or judgment was signed in that action by the trial judge. When viewed in this light, the action and its appeal take on the quality of a sham proceeding."

The above statement is directly contrary to the rule of law and **Bertero v. National General Corp.**, (1974) 13 Cal. 3d 43 that decided the dismissal of a complaint does not effect an action for malicious prosecution based on cross-pleadings. Legislation in 1971 transferred counter-claims into cross-complaints and creates an action distinct and separate from the initial pleading, and does not affect the independent existence of the cross-complaint. There are two simultaneous actions pending between the same parties.

44. Whyte filed a petition for hearing with the California Supreme Court. Kerrigan was notified by Luce to dismiss the Scales case immediately or the defendants would bring motion to dismiss and for damages to be assessed against Whyte and Kerrigan. Kerrigan was to reply by June 26, 1981, which

he did by having a copy of the Supreme Court petition served upon Luce.

45. The defendant attorneys didn't wait for a ruling from the Supreme Court, and filed two motions with the Court of Appeal, each requesting a $1,000.00 penalty.

46. The Court of Appeal failed to address the "applicable" law and denied Whyte her right to "appeal" by the entry of the following order:

> ". . .The motions to dismiss this wholly frivolous appeal are granted. The appeal is dismissed with a penalty of $1,000.00 assessed against appellant's attorney Walter F. Kerrigan for taking this frivolous appeal."

47. The above order constituted a black mark against Kerrigan that is wholly undeserved. Months before the order was entered, the Court of Appeal could have prevented two days of trial of a cause of action when none existed by granting Whyte's petition to dismiss Pauls' frivolous cross-complaint for damages for filing a lis pendens, and Whyte would not have been subjected to unjust and outrageous acts and two lawsuits and two appeals would have been avoided.

48. The above order was void on its face:

(a) The order does not mention that it was entered after a hearing, as no hearing was held, a violation of the due process clauses of both the

state and federal Constitutions (California Constitution, Article I paragraph 7; United States Constitution 14th Amendment) and California Code of Civil Procedure paragraph 128.5.

(b) Even if a hearing had been held, the order was void on its face as the court failed to issue a written order reciting "in detail" the circumstances justifying the sanction, which is mandatory and required by California Code of Civil Procedure paragraph 128.5.

(c) Even with a hearing and a detailed written order reciting the circumstances justifying the sanction had been issued, the order was void on its face, as it did not provide who was to receive the payment of the $1,000.00. The court rules make no provision who is to receive sanctions. The sanction could have been awarded to Whyte, Clerk of the Court, State of California, to the attorneys, the parties, etc.

49. Whyte filed a petition for hearing with the California Supreme Court. She did not file a petition for rehearing with the Court of Appeal as the Court began to create a serious chilling effect and the Court did not have a hearing in the first place as required by law so it appeared to be a useless act.

50. Appellees did not file a petition for rehearing, a petition for hearing, or an answer to Whyte's petition for hearing, despite the fact the order was void.

51. Supreme Court denied Whyte's petition for

hearing (Exhibit 28 to Request for Judicial Notice heretofore filed herein by defendants).

52. The County Clerk received the remittitur from the Court of Appeal on November 17, 1981 that the appeal is dismissed (Exhibit 27 to Request for Judicial Notice).

53. There was never a motion made to recall the remittitur.

54. After all litigation had terminated without a valid judgment being entered against Kerrigan in any court, Kerrigan began to get letters and phone calls from Luce making impermissible threats and representations, all in violation of his right and in violation of California law.

III. FIRST CAUSE OF ACTION

(Violation of Civil Rights)

55. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1-54.

56. On and prior to February 22, 1982 the defendant attorneys conspired and formulated a plan and acted and agreed to act in concert to present and caused to be presented a false or fraudulent claim and submitted documentation alleging that Kerrigan owed the defendant attorneys money.

57. On or about February 22, 1982, in furtherance of the objects of the aforesaid conspiracy, defendants all acting under color and pretense of the

statutes, ordinances, customs and laws of the State of California and in the willful, malicious, intentional and discriminating misuse of the Superior Court of the State of California for the County of San Diego, wilfully acting in concert with each other and the other defendants, by themselves, their agents, servants, and subordinates, each and all procurring, aiding and encouraging the other defendant, caused to be presented the false or fraudulent claim together with the documentation prepared and executed by and for the attorney defendants to the defendant Butler. (Exhibit 29 to Request for Judicial Notice heretofore filed herein by defendants).

58. That on or about February 22, 1982, Butler, acting in furtherance of the objects of the aforesaid conspiracy and acting jointly with the attorney defendants under color of law and in concert without authorization of law, acted willfully and knowingly with specific intent to deprive Kerrigan of his constitutional rights, accepted the false documentation from the attorney defendants and entered an ex parte order that Kerrigan pay Luce $1,000.00, when there was no proceeding pending, all proceedings having terminated on November 17, 1981, a matter as to which he had no jurisdiction of the person or subject matter and acted in the face of clearly valid California law expressly prohibiting him from exercising jurisdiction and in the face

of clearly valid California law expressly providing that the Court of Appeals retains jurisdiction to modify its own orders, so that Butler acted in the clear absence of all jurisdictional capacity, and acted in clear violation of the law of the State of California.

59. That on or about June 14, 1982 as a further proximate result of the acts of the defendants aforesaid and acting in furtherance of the conspiracy, the defendants and each of them, conspired, combined, agreed between themselves and acted in concert, under color and pretense of law, caused to be filed in the Superior Court of the State of California for the County of San Diego, a Declaration re: Contempt. (Exhibit 30 to Request for Judicial Notice) and caused to be entered in said court exeuted by Butler an Order to Show Cause Re: Contempt (Exhibit 31 to Request for Judicial Notice).

60. When the defendants committed the illegal acts mentioned above in paragraph 38, there were no proceedings pending in any court, all proceedings heretofore mentioned in this complaint having terminated on November 17, 1981, and Butler acted in the clear absence of all jurisdiction and in the clear absence of all jurisdictional capacity, and acted in clear violation of the law of the State of California and acted with the intentional and discriminating misuse of his authority, that of his subordinates, including the Superior Court of the State

of California, and willfully acting in concert with the other defendants by themselves, their agents, servants and subordinates, each and all procurring, aiding and encouraging the other defendants and did purposely and systematically and intentionally discriminate against plaintiff and subjected him to inequality of treatment nor privileged nor compelled by law.

61. That on or about June 14, 1982, in furtherance of the object of the aforesaid conspiracy and as a proximate cause of the illegal acts heretofore mentioned, Kerrigan was served with a copy of Order To Show Cause Re: Contempt. (Exhibit 31 of the Request for Judicial Notice).

62. On July 7, 1982, plaintiffs appeared in the Superior Court before the Honorable J. Perry Langford. Kerrigan advised the Court that it had no jurisdiction of the person or the subject matter. Judge Langford admonished the defendants and advised them that the proceedings were unconstitutional, that a judgment had not been entered, and refused their request to enter a judgment.

63. On or about July 28, 1982, in furtherance of the object of the aforesaid conspiracy and as a further proximate result of the unlawful acts of the defendants, the defendants entered into a conspiracy with the subordinates of the County Clerk of San Diego County, California. Said subordinates of the County Clerk were all agents of the State of

California. Both the defendants and the subordinates acting under color and pretense of statutes, ordinances, customs, and law of the State of California and in wilful, malicious, intentional and discriminating misuse of their authority and the misuse of the Office of the Clerk of San Diego County and the misuse of the San Diego County Courthouse, 220 West Broadway, San Diego, California, wilfully acting in concert with each other did purposely and systematically discriminate against Kerrigan and subjected him to inequality of treatment and caused to be entered in Judgment Book 1442 page number 305 the Application for Ex Parte Clarifying Order and Order unlawfully filed on February 22, 1982. (Exhibit 29 of the Request for Judicial Notice).

64. That Kerrigan did not receive a notice of entry of the "judgment" mentioned above in paragraph 42, from either the court clerk or from any of the defendants.

65. On or about July 29, 1982, in furtherance of the object of the aforesaid conspiracy and as a further result of the unlawful acts of the defendants, there was an Abstract Of Judgment (Exhibit 32 of the Request for Judicial Notice). Said Abstract Of Judgment was false in that it states that Kerrigan was a judgment debtor, when in fact no judgment had ever been entered against him. Said Abstract Of Judgment is further false in alleging the Summons was personally served to 2707 Hartford St.,

San Diego, California, when in fact no summons was ever issued and none was ever served.

66. On or about July 30, 1982, in furtherance of the object of the aforesaid conspiracy and as a further proximate result of the unlawful acts of the defendants, the defendants entered into a conspiracy with the subordinates of the County Clerk of San Diego County, California. Each and every subordinate of the County Clerk was an agent of the State of California. Both the defendants and the subordinates acting under color and pretense of statutes, ordinances, customs and law of the State of California and in wilful, malicious, intentional and discriminating misuse of their authority and the misuse of the Office of the County Clerk and the County Courthouse, wilfully acting in concert with each other did purposely and systematically discriminate against Kerrigan and subjected him to inequality of treatment and caused to be executed an Abstract Of Judgment (Exhibit 32 of the Request for Judicial Notice). Said Abstract Of Judgment was false in alleging that Luce was a judgment credit and Kerrigan was the judgment debtor since a judgment had never been entered. Said Abstract of Judgment is further false in alleging that Kerrigan owed the principal of $1,000,00 when in fact he did not owe Luce or any of the other defendants or any of the parties or anyone else the sum of $1,000.00 or any other amount.

67. On or about August 2, 1982, in furtherance of the object of the aforesaid conspiracy and as a further proximate result of the unlawful acts of the defendants, the defendant misused the Office of the County Recorder of San Diego County, California and the subordinates of said County Recorder and caused to be recorded the fraudulent and false Abstract of Judgment as document number 82-36894. (Exhibit 32 of the Request for Judicial Notice).

68. That Kerrigan was informed about the false and fraudulent recording of the Abstract Of Judgment mentioned above in paragraph 45, when he received a copy of same and a notification from the County Recorder that there was a lien on plaintiffs' real property.

69. That the defendants under color of law acted together and in concert without authorization of law and without the use of the State of California's legal machinery, acted wilfully and knowingly with specific intent to deprive Kerrigan of his right to:

a. Freedom from coercion and intimidation.

b. Freedom from punishment for his association and representation of Whyte.

c. Freedom to pursue his profession without abridgement by arbitrary state action.

d. Right to due process of law.

e. Right to the equal protection of law.

f. Right to acquire, enjoy, own, lease, sell,

hold and convey property without abridgement by arbitrary state action.

g. Right of privacy and the right to be left alone without abridgement by arbitrary state action.

That all of these rights are secured to Kerrigan by the First Amendment and the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States and Title 42 United States Code §1983.

70. That the defendants under color of law acted together and in concert without authorization of law and without the use of the State of California's judicial machinery, acted wilfully and knowingly and caused Mrs. Kerrigan to be deprived of her right to:

a. Freedom from coercion and intimidation.

b. Right to due process of law.

c. Right to equal protection of law.

d. Right to acquire, enjoy, own, lease, sell, hold, and convey property without abridgement by arbitrary stae action.

e. Right of privacy and the right to be left alone without abridgement by arbitrary state action.

That all of these rights are secured to Mrs. Kerrigan by the First Amendment and the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United

States and Title 42 United States Code §1983.

71. The defendants acted wrongfully, maliciously, wantonly and in wilful and conscious disregard for the rights of the plaintiffs, and with the intent to abuse, intimidate, harrass and humiliate plaintiffs and cause them injury. By reason of the foregoing, Plaintiffs are entitled to recover exemplary or punitive damages from defendant, and each of them, in such amount as the jury shall determine to be proper.

IV. *SECOND CAUSE OF ACTION*

(Libel per se)

72. Plaintiff, Walter F. Kerrigan, hereby incorporates by reference and realleges the allegations of: paragraphs 1 to 71.

73. That the defendants acting together and in concert without authorization of law as heretofore described, caused to be published an Application For Ex Parte Clarifying Order And Order with exhibits and other documentation (Exhibit 29 of the Request for Judicial Notice), Declaration Re: Contempt (Exhibit 30 of the Request for Judicial Notice), Order To Show Cause Re: Contempt (Exhibit 31 of the Request for Judicial Notice). And caused to be republished the Application For Ex Parte Clarifying Order and Order in Judgment Book 1443

Page 305 (Exhibit 32 of the Request for Judicial Notice).

74. While it appears on the face of the above described documents that they were made and filed in the Superior Court of California, Office Of The County Clerk and Office of the County Recorder and that plaintiff's claim of libel is absolutely bared by Civil Code §47(2), none of the above described publications are privileged and defendants are precluded from relying upon the absolute privilege afforded by Civil Code §47 paragraphs (1), (2), (3), (4), and (5), as the publications were not in a judicial proceeding as heretofore mentioned. Plaintiff further alleges that defendants do not have an absolute, constitutional, or qualified privilege pursuant to any section or paragraph of the Civil Code or any statute.

75. While it appears on the face of the publication mentioned above that one of the defendants was a judge of the Superior Court and has an absolute privilege to defame plaintiff, the judge does not have privilege, absolute, constitutional, or qualified, as heretofore mentioned the judge was acting in the clear absence of all jurisdiction, i.e., of authority to act officially over the person or over the subject matter and the proceedings were coram non judice and the defendant lost his judicial function and had become a mere private person and is liable for the damages resulting from his unauthorized and illegal acts.

76. While it appears for the heretofore described publications that one of the defendants is a Superior Court judge and the complaint does not allege the presentation of a proper and timely claim for damages by plaintiff prior to the institution of this action as provided by the claims statute (Gov. Code paragraphs 910 et seq.), no prior claim is required to be filed against the said defendant for his liability to plaintiff, as California law provides that when a judge acts in his individual capacity as noted above in paragraph 54, a claim is not barred by doctrine of judicial immunity nor by plaintiff's failure to file a claim prior to filing suit.

77. All the above mentioned publications are libelous on their face and are actionable per se as they clearly expose plaintiff to hatred, contempt, ridicule, and obloquy because they allege:

a. Plaintiff refuses to pay his just debts.

b. Plaintiff has failed to obey an order of the Court of Appeal, State of California, Fourth Appellate District.

c. Plaintiff has failed to obey an order of the Superior Court Of The State Of California For The County Of San Diego.

d. Plaintiff's disobedience has been wilful and with the intent to frustrate the process of the Court of Appeal State Of California Fourth Appellate District and also the Superior Court Of The State Of California For

The County of San Diego.

e. Plaintiff filed a frivolous appeal.

f. Plaintiff owed money to the defendant attorneys.

g. Plaintiff performed unnecessary legal services.

h. Plaintiff took advantage of his client.

i. Luce has a judgment of record against

j. Libelous language with respect to the conduct of plaintiff in a particular case.

k. Claims characteristics and conduct of plaintiff which are incompatible with proper and lawful exercise of his profession.

l. Plaintiff has no integrity in his profession.

78. That some of the libelous material heretofore mentioned is now on file in the Superior Court, some of the libelous materials in the judgment records of the County Clerk's Office, and the fraudulent Abstract of Judgment is recorded with reference to the other libelous material in the County Recorder's Office. That each and every location where the libelous material was published is open to inspection and to be read by any member of the public. That some of the libelous material was seen and read by the Honorable J. Perry Langford, a judge of the Superior Court of the State of California for San Diego County as heretofore mentioned and also read by his subordinates, court personnel, and the clerks of the court.

79. That at all times mentioned plaintiff was and is now a self-employed attorney engaged in the general practice of law. Plaintiff has been an attorney for over forty years and had always enjoyed a good reputation in his profession.

80. That at all times mentioned plaintiff has been active in local community affairs and had enjoyed a good reputation in the Sons Of The American Revolution, American Civil Liberties Union, United States Navy League, Friends Of San Diego Public Library, Mission Bay Park Committee, Friends of Nazareth, Kiwanis, Clairemont Mesa Development Committee, Sierra, Clairemont Town Council, Shamrock Society, Friendly Sons of St. Patrick, and Church and local organizations.

81. That at all times mentioned plaintiff has and now has a lifetime certificate to teach law and business and has used his certificate to teach law in the San Diego Community College District. For several years he served as an Affirmative Action Officer for the District.

82. As a proximate result of the above-described publication, plaintiff has suffered loss of his reputation, shame, mortification, and hurt feelings all to his general damage according to proof.

83. The above described publications were published by the defendants with actual malice in that they were published for an improper motive in that said false and defamatory statements exceed any

necessary statements to be made in their role as a judge or attorneys, and said publications were made because of feelings of illwill to the plaintiff and with the desire to oppress plaintiff. Plaintiff alleges that the above described publications were made by defendants and each of them, with malice and to injure, disgrace and defame plaintiff. The publications were made as part of a plan devised by defendants, and each of them, to discredit and impugn the reputation and integrity of plaintiff. The defendants, and each of them knew that the statements made in the publications were false or made without belief or any reasonable grounds for believing in the truth of their statements. The defendants knew or should have known that the Chief Justice of the California Supreme Court is of the opinion that Whyte's petition for hearing in the Supreme Court should be granted (Exhibit 20 of the Request for Judicial Notice). The publications were calculated by defendants, and each of them, to and did expose plaintiff to hatred, contempt, ridicule and obloquy. All litigation had terminated months before when the remittitur had been received by the County Clerk (Exhibit 27 of the Request for Judicial Notice) and the subject matters of the suits were res judicata and no disputes were pending and no further action had to be taken by plaintiff. As a result, the statements set forth in the publications have gone beyond what is justified as there were no

disputes and were made specifically to injure, disgrace and defame plaintiff all as a result of the hatred or illwill of defendants, and each of them, towards plaintiff. Further, defendants published said publications with knowledge that the statements therein were false and defendants knew that plaintiff had not performed unnecessary legal services for his client or that he owed any of the defendants any money or committed any of the other acts. Defendants made said statements with knowledge of their falsity, in reckless disregard of the truth, and with no reasonable grounds for believing that the statements were true.

84. The defendants acted wrongfully, maliciously, wantonly and in wilful and conscious disregard for the rights of the plaintiff, and with the intent to abuse, intimidate, harrass, humiliate, and defame plaintiff and cause him injury. By reason of the foregoing, plaintiff is entitled to recover exemplary or punitive damage from defendants, and each of them, in such amount as the jury shall determine to be proper.

V. *THIRD CAUSE OF ACTION*
(Slander of Title)

85. Plaintiffs Walter F. Kerrigan and Dorothy R. Kerrigan hereby incorporate by reference and reallege the allegations of: paragraphs 1-76.

86. That on August 2, 1982, the plaintiffs were and still are the owners in fee holding title as community property to the following described real property:

Lots 13 and 14 in Block 116 of MORENO, in the City of San Diego, County of San Diego, State of California, according to Map thereof No. 809, filed in the Office of the County Recorder of San Diego County, January 2, 1896.

87. That the defendants acting together and in concert without authorization of law as heretofore described, and the proximate cause of said acts, caused to be issued an Abstract of Judgment (Exhibit 32 of the Request for Judicial Notice), and the same was recorded in the official records of San Diego County, California by the County Recorder on August 2, 1982 as document number 82-236894. That the recording of the false Abstract of Judgment aforesaid caused doubt to be case on plaintiffs' title to the real estate described above in paragraph 86.

88. While it appears on the face of the above Abstract of Judgment that it was issued as a result of a judgment entered in a legal proceeding, the "judgment" was not entered in any judicial proceedings or any other proceedings authorized by law by the

defendant judge who had no jurisdiction and was prohibited from taking jurisdiction by California law by a defendant judge not acting in his official position but in his individual capacity. And as heretofore mentioned the said false abstract was fraudulently issued as the result of the wrongful acts of the defendants and was recorded without any privilege.

89. That as heretofore mentioned the Abstract Of Judgment was false and caused doubt to be cast on plaintiffs' title to the property described in paragraph 86.

90. The aforementioned recording directly impaired the vendibility of the property on the open market and it will impair the vendibility of any real property to be purchased in San Diego County.

91. The aforementioned publication of the Abstract of Title made it necessary for plaintiffs to retain an attorney and to bring this action to cancel the instrument casting doubt on plaintiffs' title. Therefore, plaintiffs are entitled to recover attorney's fees and costs incurred in cancelling the instrument.

92. The false lien caused by the illegal acts of the defendants as heretofore described, clouds the title of plaintiffs' real estate described in paragraph 86, depreciates the market value thereof, and prevents plaintiffs from enjoying the use of the real property and the premises in the manner most

to their interests as owners thereof.

93. The defendants acted wrongfully, maliciously, wantonly, and in wilful and conscious disregard for the rights of the plaintiffs, and with the intent to abuse, intimidate, harass and humiliate plaintiffs and slandering the title of all lands owned by them or to be acquired by them. By reason of the foregoing, plaintiffs are entitled to recover exemplary or punitive damages from defendants and each of them, in such amounts as the jury shall determine to be proper.

VI. PRAYER FOR RELIEF

94. Plaintiffs therefore request this Court to grant judgment and relief as follows:

(a) That the Court issue a permanent injunction restraining each and all of the defendants from further interference with the plaintiffs' exercise of their civil rights, liberties and freedoms;

(b) That the Court award each plaintiff compensatory damages against defendants, jointly and severally, in an amount not less than $100,000.00 for each of the claims for relief set forth above.

(c) That the Court award each plaintiff punitive damages against defendants, jointly and severally, in the amount of

$5,000,000.00 for each of the claims for relief set forth above.

(d) That the Court award plaintiffs reasonable attorneys fees pursuant to 42 U.S.C. paragraph 1988.

(e) That defendants be ordered to deliver the Abstract Of Judgment to the Clerk of the Superior Court of the State of California for the County of San Diego for cancellation and that it be declared void.

(f) That the defendants be ordered to release the involuntary lien by recording a release of lien in the Office of the Recorder of the County of San Diego, State of California.

(g) For damages caused plaintiffs by the inconveniences and time suffered by plaintiffs in removing this cloud on their title.

(h) For attorneys' fees and costs incurred in removing the cloud on plaintiffs' title according to proof.

(i) For costs of suit incurred herein.

(j) For such other and further relief as the Court may deem proper.

JURY DEMAND

TAKE NOTICE that the plaintiffs demand a jury

trial pursuant to Rule 38(b) of the Federal Rules of Civil Procedure of all issues by trial by jury.
DATED: June 29, 1983

Walter F. Kerrigan
Attorney for Dorothy R. Kerrigan
and for Walter F. Kerrigan
Plaintiffs, pro se

No. 462388 CAROLINE H. WHYTE Plain/Applt. vs. SCALES, PATTON, ELLSWORTH, ET AL.

9TH CIVIL 24614

Please be advised that the Remittitur has been received from the Court of Appeal in the above entitled case. The judgment/order is **APPEAL IS DISMISSED**. Respondent to recover costs on appeal.

ENTERED: ROBERT D. ZUMWALT, County Clerk
DATE: November 17, 1981
Book 1385 Pg 301 By CESAR E. GUERRERO
Appeals Clerk

EXHIBIT "27"

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL
4th District, Division 1, Civil No. 24614

REC'D NOV 20 '81

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

Supreme Court
FILED
NOV 13 1981
LAURENCE P. GILL, Clerk

_____
Deputy

WHYTE

v.

SCALES, PATTON, ELLSWORTH & CORBETT, etc.

Appellant's petition for hearing DENIED.

Bird, C.J., is of the opinion the petition should be granted.

_____
Chief Justice

EXHIBIT "28"

FILED
FEB 22 1982
Robert D. Zumwalt, Clerk
By J. Schneider
Deputy
ENTERED
JUL 23 1982
Judgment Book 1443 Pg 385

Julie A. Greenberg
LUCE, FORWARD, HAMILTON & SCRIPPS
1700 The Bank of California Plaza
110 West A Street
San Diego, California 92101
(714) 236-1414
Attorneys for Defendants: SCALES, PATTON, ELLSWORTH & CORBETT; ERWIN & ANDERHOLT LUKE R. CORBETT; DAVID M. FRANKLIN; RALPH E. HUGHES and MICHAEL H. WEXLER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

No. 462388

APPLICATION FOR EX PARTE CLARIFYING ORDER AND ORDER

EXHIBIT "29"

CAROLINE H. WHYTE,

Plaintiff,

v.

SCALES, PATTON, ELLSWORTH & CORBETT, a professional corporation; ERWIN & ANDERHOLT, a professional corporation; LUKE R. CORBETT; DAVID M. FRANKLIN; JANA W. GREEN; RALPH E. HUGHES; MICHAEL H. WEXLER; NORMAN PAUL; SHIRLEY J. PAUL and DOES I-XX, inclusive,

Defendants.

CAROLINE H. WHYTE ("WHYTE"), by and through her attorney, WALTER F. KERRIGAN, instituted the instant action against SCALES, PATTON, ELLSWORTH & CORBERT; ERWIN & ANDERHOLT; LUKE R. CORBETT; DAVID M. FRANKLIN; JANA W. GREEN; RALPH E. HUGHES; MICHAEL H. WEXLER; NORMAN PAUL; SHIRLEY J. PAUL and DOES I-XX, inclusive, ("DEFENDANTS") for malicious prosecution. This action is the fourth in a series of lawsuits maintained by WHYTE against various parties based upon the same facts.

On February 26, 1981, the Honorable Judith

McConnell issued an order sustaining Defendants' demurrer without leave to amend. WHYTE filed a Notice of Appeal of this decision. Defendants filed a Motion to Dismiss the appeal as frivolous. Defendants' Motion was based upon the fact that the identical issues had been determined upon ~~alleap~~ of WHYTE's third lawsuit against other parties.

On July 27, 1981, the Court of Appeal issued its order dismissing WHYTE's appeal. The order stated:

> The Motions to Dismiss this wholly frivolous appeal are granted. The appeal is dismissed with a penalty of $1,000.00 imposed against appellant's attorney, Walter F. Kerrigan, for taking this frivolous appeal.

WHYTE filed a Petition for Hearing with the Supreme Court. On November 13, 1981, the Supreme Court denied WHYTE's Petition for Hearing.

KERRIGAN has not paid the $1,000.00 in compliance with the Court's order. LUCE, FORWARD, HAMILTON & SCRIPPS contacted KERRIGAN by letter on December 2, 1981, December 4, 1981 and December 23, 1981. (Copies of these letters are attached hereto as Exhibits A, B and C, respectively, and incorporated herein by this reference). LUCE, FORWARD, HAMILTON & SCRIPPS also contacted KERRIGAN by telephone on February 1, 1982. During this conversation, KERRIGAN stated

that he refused to pay the $1,000.00 to any individual without a clarifying order stating to whom the money should be paid. He requested a clarifying order even though LUCE, FORWARD, HAMILTON & SCRIPPS' clients are the only parties asserting a claim to the $1,000.00.

KERRIGAN was again contacted by telephone on February 19, 1982 and informed that LUCE, FORWARD, HAMILTON & SCRIPPS had written waivers from all parties to the action stating that they made no claim to the $1,000.00. (The written waivers are attached hereto as Exhibits D and E and incorporated herein by this reference). KERRIGAN refused to pay the $1,000.00. He was informed that LUCE, FORWARD, HAMILTON & SCRIPPS would appear Ex Parte on February 22, 1982 at 4:00 P.M. seeking an order stating that KERRIGAN pay the $1,000.00 to LUCE, FORWARD, HAMILTON & SCRIPPS on behalf of its clients. He was further informed that LUCE, FORWARD, HAMILTON & SCRIPPS would seek costs and attorneys' fees.

KERRIGAN is fully aware of the fact that no individual other than LUCE, FORWARD, HAMILTON & SCRIPPS' clients seek the $1,000.00. All defendants in this action have had to incue large attorneys' fees and costs opposing KERRIGAN's frivolous claims. Due to KERRIGAN's actions, Defendants must now bring this Ex Parte application.

WHEREFORE, Defendants respectfully request:

1. An order directing WALTER F. KERRIGAN to pay to LUCE, FORWARD, HAMILTON & SCRIPPS forthwith $1,000.00;

2. Costs;

3. Attorneys' fees; and

4. Such other relief as the Court deems just.

Respectfully submitted,
LUCE, FORWARD, HAMILTON & SCRIPPS
Dated: February 22, 1982

By Julie A. Greenberg
Attorneys for Defendants Scales, Patton, Ellsworth & Corbett; Erwin & Anderholt; Luke R. Corbett, David M. Franklin, Ralph E. Hughes and Michael H. Wexler

ORDER

Application having been made by SCALES, PATTON, ELLSWORTH & CORBETT; ERWIN & ANDERHOLT; LUKE R. CORBETT; DAVID M. FRANKLIN; RALPH E. HUGHES; and MICHAEL H. WEXLER with proof having been made to the satisfaction of the court, and good cause appearing therefore,

IT IS ORDERED that WALTER F. KERRIGAN pay to LUCE, FORWARD, HAMILTON & SCRIPPS the sum of $1,000.00 forthwith.

IT IS FURTHER ORDERED that WALTER F. KERRIGAN pay to LUCE, FORWARD, HAMILTON & SCRIPPS the sum of $_____ in costs and the sum of $_____ in attorneys' fees.

DATED: _____

_____

JUDGE OF THE SUPERIOR COURT
EDWARD T. BUTLER

FILED
Robert D. Zumwalt, Clerk
JUN 14 1982
By C. Martin, Deputy

STEVEN S. WALL
JULIE A. GREENBERG
LUCE, FORWARD, HAMILTON & SCRIPPS
1700 The Bank of California Plaza
110 West A Street
San Diego, California 92101
(714) 236-1414
Attorneys for Defendants SCALES, PATTON, ELLSWORTH & CORBETT, ERWIN & ANDERHOLT, LUKE R. CORBETT, DAVID M. FRANKLIN, RALPH E. HUGHES and MICHAEL H. WEXLER

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

Case No. 462388
CAROLINE H. WHYTE,

Plaintiff,

vs.

SCALES, PATTON, ELLSWORTH & CORBETT, a professional

EXHIBIT "30"

corporation, ERWIN & ANDERHOLT, a professional corporationl, LUKE R. CORBETT, DAVID M. FRANKLIN, JANA W. GREEN, RALPH E. HUGHES, MICHAEL H. WEXLER, NORMAN PAUL, SHIRLEY J. PAUL, DOES I-XX, inclusive,

Defendants.

DECLARATION RE: CONTEMPT, C.C.P. §1211, C.C.P. §128.5

I, JULIE A. GREENBERG, declare:

1. I am an associate in the law firm of Luce, Forward, Hamilton & Scripps, Attorneys for Defendants SCALES, PATTON, ELLSWORTH & CORBETT, ERWIN & ANDERHOLT, LUKE R. CORBETT, DAVID M. FRANKLIN, RALPH E. HUGHES and MICHAEL H. WEXLER (Defendants) herein.

2. WALTER F. KERRIGAN is the attorney for the Plaintiff, CAROLINE H. WHYTE, herein.

3. On July 27, 1981, the Court of Appeals ordered that WALTER F. KERRIGAN pay $1,000 in sanctions for filing a frivolous appeal. (4th Civil No. 24614).

4. On November 13, 1981, the California Supreme Court denied plaintiff's petition for hearing.

5. On December 23, 1981, Luce, Forward, Hamilton & Scripps requested by letter to Mr. KERRIGAN

that he pay the $1,000. Mr. KERRIGAN refused to pay any amount to Luce, Forward, Hamilton & Scripps. He maintained that the Appellate Court's order was unclear as to whom the amount should be paid.

6. On February 22, 1982, the Honorable Edward T. Butler made an order directing WALTER F. KERRIGAN to pay $1,000 to Luce, Forward, Hamilton & Scripps. on behalf of Defendants.

7. WALTER KERRIGAN had actual knowledge of the foregoing order.

8. On March 9, 1982, I contacted WALTER F. KERRIGAN requesting payment. He would not state whether he would pay the $1,000.

9. Luce, Forward, Hamilton & Scripps has not received any portion of the $1,000.00.

10. At all times herein mentioned WALTER F. KERRIGAN had the ability to comply with the foregoing order and still has the ability to do so.

11. At all times herein mentioned the order has remained in full force and effect.

12. WALTER F. KERRIGAN has disobeyed the order in that he has failed to pay any sum to Luce, Forward, Hamilton & Scripps.

13. WALTER F. KERRIGAN's disobedience has been willful and with the intent to frustrate the processes of this court and to deprive Defendants herein of the benefits to which they are entitled under the order.

14. Such actions have caused Defendants to incur further expenses and attorneys' fees in collecting the sanctions awarded by the Appellate Court.

WHEREFORE, I, the declarant herein, pray that this court issue an order requiring WALTER F. KERRIGAN to show cause, if any, why he should not be judged in contempt of this court by reason of his violation of the foregoing order as alleged above. I further request that the court order WALTER F. KERRIGAN to pay defendant's expenses and attorneys' fees in collecting the sanctions awarded, pursuant to C.C.P. §128.5.

I declare under penalty of perjury that the foregong is true and correct and that this declaration was executed on June 14, 1982, at San Diego, California.

JULIE A. GREENBERG

FILED
Robert D. Zumwalt, Clerk
JUN 14 1982
By C. Martin, Deputy

STEVEN S. WALL
JULIE A. GREENBERG
LUCE, FORWARD, HAMILTON & SCRIPPS
1700 The Bank of California Plaza
110 West A Street
San Diego, California 92101
(714) 236-1414
Attorneys for Defendants SCALES, PATTON, ELLSWORTH & CORBETT, ERWIN & ANDERHOLT, LUKE R. CORBETT, DAVID M. FRANKLIN, RALPH E. HUGHES and MICHAEL H. WEXLER

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO

Case No. 462388
CAROLINE H. WHYTE,

Plaintiff,

vs.

SCALES, PATTON, ELLSWORTH & CORBETT, a professional corporation ERWIN & ANDERHOLT, a professional

EXHIBIT "31"

corporation, LUKE R. CORBETT,
DAVID M. FRANKLIN, JANA W. GREEN
RALPH E. HUGHES, MICHAEL H. WEXLER,
NORMAN PAUL, SHIRLEY J. PAUL,
DOES I-XX, inclusive,

Defendants.

**ORDER TO SHOW CAUSE RE:
CONTEMPT, C.C.P. §1212**

To WALTER F. KERRIGAN herein:

YOU ARE ORDERED to appear on July 7, 1982, at 8:30 o'clock a.m., or as soon thereafter as the matter may be heard, in the courtroom of Department 18 of the above-entitled court, located at 220 West Broadway, San Diego, California, then and there to show cause, if any you have, why you should not be adjudged in contempt of court and punished accordingly for willfully disobeying the order of this court made on February 22, 1982, and the order of the Court of Appeals made on July 27, 1981, in the above-entitled action.

The orders of February 22, 1982 and July 27, 1981, and your disobedience thereto, are more particularly described in the Declaration of JULIE A. GREENBERG, which is attached hereto and made a part hereof.

This order shall be served on you by delivering a

copy thereof, attached to a copy of the Declaration of JULIE A. GREENBERG, at least 15 days prior to the date of the hearing.

Dated: **JUN 14 1982,**

EDWART T. BUTLER

JUDGE OF THE SUPERIOR COURT

RECORDED IN
OFFICIAL RECORDS
OF SAN DIEGO COUNTY, CA

Attorney or Party Without Attorney
(Name and address):
Recording Requested by and return to:
Julie A. Greenberg (714)236-1414
LUCE, FORWARD, HAMILTON & SCRIPPS
110 West A Street, Suite 1700
San Diego, California 92101
Attorney For (Name): Defendants

FOR RECORDER'S USE ONLY
82-236894
RECORDED IN
OFFICIAL RECORDS
OF SAN DIEGO COUNTY, CA
1982 Aug-
1982 AUG-2 PM 2:16
COUNTY RECORDER

NAME OF COURT AND BRANCH, IF ANY:
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
Street Address: 220 West Broadway
Mailing Address:
City, Zip Code: San Diego, California 92101
Plaintiff:
Caroline H. Whyte
Defendant: Scales, Patton, Ellsworth & Corbett, et al.

EXHIBIT "32"

RF 3 --
MG 1 --
LF 3 50

ABSTRACT OF JUDGMENT

Case Number: 462388
For Court Use Only
2 76 462388
709 2632 7/30/59
3.50 MO
3.50 TL
3.50
7/20/ 2

The Judgment creditor applies for an abstract of judgment and represents
a. Judment debtor's
NAME AND ADDRESS
Walter F. Kerrigan
2707 Hartford St.
San Diego, CA 92110

____Address unknown
Driver's license state and number..... xx unknown
Social Security number ..... xx unknown.
b. Summons was personally served at or mailed to (address):
2707 Hartford St., San Diego, CA
_____Information regarding additional judgment debtors is shown on the reverse.

Dated: 7/29/82

Julie A. Greenberg
(Type of print name)

_____
(Signature of Judgment Creditor or Attorney)

I certify that the following is a true and correct abstract of the judgment entered in this action.

Judgment creditor (Name):
Luce, Forward, Hamilton & Scripps

Judgment debtor (full name as it appears in judgment)
Walter F. Kerrigan

Total amount of judgment as entered
a. Principal: $1,000.00
b. Attorney fees: $
c. Interest: $
Costs: $
Total: $1,000.00

Judgment was entered
a. on (date): 7/28/82 Sup. Ct. No. 462388
b. _____in judgment book, minute book or docket
(1) Volume no.: 1443 (2) Page no.: 305

A lien in favor of a judgment creditor pursuant to CCP 688.1 is
a. xx not endorsed on the judgment
b. _____endorsed on the judgment as follows:
(1) amount $
(2) in favor of (name):

A stay of execution has

a. xx not been ordered by the court

b. _____been ordered by the court effective until (date):

ROBERT D. ZUMWALT, Clerk

By _____R. Duffy_____, Deputy

This abstract issued on (date):____JUL 30 1982____

ABSTRACT OF JUDGMENT

BEST AVAILABLE COPY

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4075 Agate Street, Riverside, California 92509.

On March , 1985, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in each of four (4) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

Greer D. Knopf
Deputy County Counsel
355 County Administration Center
San Diego, CA 92101

Paul R. Kennerson, Esq.
Gibson & Kennerson
1665 Union Street
San Diego, CA 92101

Jeffrey N. Garland, Esq.
Marinos, Styn & Studebaker
111 Elm St., Suite 300
San Diego, CA 92101-2682

Reg A. Vitek, Esq.
Seltzer, Caplan, Wilkins & McMahon
3003-3043 Fourth Avenue
San Diego, CA 92103

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on March , 1985, at Riverside, CA.

JACK GALLAGHER

Office-Supreme Court, U.S.
FILED
MAY 6 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1486

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

WALTER F. KERRIGAN and DOROTHY R. KERRIGAN,
Plaintiffs and Petitioners,

VS.

LUCE, FORWARD, HAMILTON & SCRIPPS, a professional corporation; STEVEN W. WALL, JULIE A. GREENBERG, SCALES, PATTON, ELLSWORTH & CORBETT, a professional corporation; LUKE R. CORBETT, RALPH E. HUGHES, MICHAEL E. WEXLER, ERWIN & ANDERHOLT, a professional corporation; DAVID M. FRANKLIN, MARINOS, STYN & STUDEBAKER, a professional corporation; RONALD L. STYN, JANA W. GREEN, EDWARD T. BUTLER,
Defendants and Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FROM RESPONDENTS LUCE, FORWARD, HAMILTON & SCRIPPS, STEVEN W. WALL and JULIE A. GREENBERG.

REG A. VITEK,
Counsel of Record
ELIZABETH A. SMITH, members of
SELTZER CAPLAN WILKENS
& MCMAHON
3003 Fourth Avenue
San Diego, CA 92103
(619) 291-3003
Attorneys for Defendants and Respondents Luce, Forward, Hamilton & Scripps, Steven S. Wall and Julie A. Greenberg

Bowne of Los Angeles, Inc., Law Printers. (213) 742-8600.

18

QUESTION PRESENTED

Petitioners WALTER F. KERRIGAN and DOROTHY R. KERRIGAN state that the question presented to this Court is whether the amended complaint stated a cause of action. Petitioners confuse this petition for a writ of certiorari with an appeal, where the issue might properly be whether an error had been committed by the court below.

The question presented *on this petition* is only whether special and important reasons exist which would justify this Court issuing a writ of certiorari. Respondents LUCE, FORWARD, HAMILTON & SCRIPPS, STEVEN W. WALL and JULIE A. GREENBERG submit that no such reasons exist and the petition should be denied.

LIST OF PARTIES

All parties appear in the caption of this case, except that the following attorneys are members of LUCE, FORWARD, HAMILTON & SCRIPPS, a professional corporation:

Edgar A. Luce, Jr.
Jack W. Crumley
Marshall L. Foreman PC
Robert E. McGinnis PC
Robert B. Bottomley PC
Robert G. Steiner PC
E. Miles Harvey PC
William M. McKenzie PC
Gerald S. Davee PC
James M. Dort PC
J. Mark Rhoads
Theodore W. Graham PC
John W. Brooks, Jr. PC
Jerry W. Monroe PC
William L. Hoese PC
John D. Collins PC
K. Michael Garrett APC
Steven S. Wall PC
Lee R. Rydalch PC
Thomas M. Murray PC
Stephen R. Brown PC
Ronald W. Rouse PC
Charles L. Hellerich
Richard M. Freeman PC
Luther W. Horton
Charles A. Bird PC
Craig K. Bean
Ruth R. Mijuskovic
Mark C. Mazzarella
Michael T. Andrew

Gregory D. Roper
John B. McNeece
Michael J. Weaver PC
Scott W. Sonne
Susanne J. Stanford
Patrick C. Shea PC
Craig R. McClellan
Robert J. Bell
John R. Bonn
George S. Howard
G. Edward Arledge
Jack C. Charney
Donald L. Salem.

The following attorneys are of counsel to LUCE, FORWARD, HAMILTON & SCRIPPS, a professional corporation:

William Yale
Thomas M. Hamilton
Robert C. Brockway.

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Williams v. Gorton, 529 F.2d 668 (9th Cir. 1976)	7

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No. 84-1486

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

WALTER F. KERRIGAN and DOROTHY R. KERRIGAN,
Plaintiffs and Petitioners,

VS.

LUCE, FORWARD, HAMILTON & SCRIPPS, a professional corporation; STEVEN W. WALL, JULIE A. GREENBERG, SCALES, PATTON, ELLSWORTH & CORBETT, a professional corporation; LUKE R. CORBETT, RALPH E. HUGHES, MICHAEL E. WEXLER, ERWIN & ANDERHOLT, a professional corporation; DAVID M. FRANKLIN, MARINOS, STYN & STUDEBAKER, a professional corporation; RONALD L. STYN, JANA W. GREEN, EDWARD T. BUTLER,
Defendants and Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FROM RESPONDENTS LUCE, FORWARD, HAMILTON & SCRIPPS, STEVEN W. WALL and JULIE A. GREENBERG.

I

STATEMENT OF THE CASE

A. Nature of the Case

On February 17, 1983, petitioners WALTER F. KERRIGAN and DOROTHY R. KERRIGAN (collectively

"Kerrigan") filed their original complaint, alleging violation of 42 U.S.C. section 1983. Pendant state claims for libel and slander of title were included.

Kerrigan's claims were based on an order of the California Fourth District Court of Appeal imposing sanctions for a frivolous appeal taken by WALTER F. KERRIGAN ("Mr. Kerrigan"), an attorney, and on subsequent San Diego Superior Court orders clarifying the recipient of that sanction award. When Mr. Kerrigan failed to pay the $1,000.00 in sanctions, an abstract of judgment was issued and then recorded.

Kerrigan claims that the Fourth District Court of Appeal did not have the authority to order the payment of sanctions and that the San Diego Superior Court lacked authority to enter judgment on the sanction award. They further claim that the foregoing occurrences somehow involved federally protected rights and constituted libel and slander of title under California law.

B. Parties.

1. Plaintiffs.

Mr. Kerrigan is a practicing attorney who represented Carolyn H. Whyte ("Mrs. Whyte") in several California Superior Court lawsuits between 1977 and 1982. According to his own allegations, Mr. Kerrigan is an experienced attorney, admitted to practice in several states, including California and New York, and conversant with both trial and appellate procedures.[1]

DOROTHY KERRIGAN is the wife of Mr. Kerrigan. She is not a party to the claim of libel and did not partici-

---

[1]Amended Complaint, pages A-13 through A-51 of Appendix to Petition for Writ of Certiorari ("Petitioners' Appendix"), pages A-21 and A-22.

pate in any of the events leading to this most recent lawsuit. Her only claim is based upon slander of title.

2. Defendants.[2]

LUKE R. CORBETT, MICHAEL H. WEXLER, SCALES, PATTON, ELLSWORTH & CORBETT, RALPH E. HUGHES, DAVID M. FRANKLIN and ERWIN & ANDERHOLT are lawyers who represented defendants and cross-complainants in the first action brought by Mr. Kerrigan on behalf of Mrs. Whyte. First American Title Insurance Company ("First American") intervened to file a cross-complaint. By stipulation of the parties, Mrs. Whyte dismissed a portion of her claim and First American dismissed a portion of its claim. Trial proceeded on remaining claims. Mrs. Whyte was unsuccessful at trial and the stipulation was incorporated into a judgment against Mrs. Whyte, entered on April 4, 1980. Mr. Kerrigan appealed but the judgment was affirmed.

MICHAEL H. WEXLER, RALPH E. HUGHES and SCALES, PATTON, ELLSWORTH & CORBETT are lawyers who represented First American as a defendant in a malicious prosecution suit which Mr. Kerrigan brought, again on behalf of Mrs. Whyte. A demurrer to the complaint in this second action was sustained without leave to amend on the ground that a malicious prosecution suit could not be based on a dismissal by stipulation. Mr. Kerrigan again appealed. The judgment was affirmed and the California Court of Appeal specifically noted the baseless nature of the appeal, characterizing it as "a sham proceeding."

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[2]The following is based upon the record below. Because this matter is presented as background only, respondents have not requested that the record be certified and transmitted prior to action by this Court on the petition for certiorari, in accord with U.S. Sup. Ct. Rule 19.

STEVEN W. WALL, LUCE, FORWARD, HAMILTON & SCRIPPS, RONALD L. STYN and MARINOS, STYN & STUDEBAKER are lawyers who represented defendants, including some of the above-named attorneys (as well as JANA GREEN, an attorney for First American), in the third suit filed by Mr. Kerrigan on behalf of Mrs. Whyte — again alleging malicious prosecution and based on the very same facts as his prior suit. Again, a demurrer to the complaint was sustained without leave to amend. Again, Mr. Kerrigan appealed. This time, upon dismissing the appeal, the California Court of Appeal imposed sanctions of $1,000.00 against "appellant's attorney Walter F. Kerrigan for taking this frivolous appeal." The case was remitted to the trial court.

JULIE A. GREENBERG, STEVEN W. WALL and LUCE, FORWARD, HAMILTON & SCRIPPS then obtained an order from the San Diego Superior Court designating the recipient of the sanction award which, incidentally, has never been paid.

C. Proceedings Below.

Kerrigan then filed a complaint in the District Court for the Southern District of California, claiming that the imposition of sanctions by the California courts somehow violated his civil rights. They appended state law claims for libel and slander of title.

On March 15, 1983, the defendants below filed a motion to dismiss the action for failure to state a claim upon which relief can be granted. The motion was based on Kerrigan's failure to plead any of the requisite elements of a violation of 42 U.S.C. section 1983 and upon the absolute privilege given by California statute for statements made in the course of judicial proceedings. On June 6, 1983, an order was entered granting the motions to dis-

miss and giving Kerrigan 45 days in which to file an amended complaint.

On June 29, 1983, Kerrigan filed the Amended Complaint, a copy of which is attached to his petition. Defendants again filed motions to dismiss on the same grounds as the prior motions. These motions to dismiss were granted without leave to amend.

On October 7, 1983, an order was entered in the district court, dismissing the Amended Complaint. Kerrigan then appealed to the Ninth Circuit Court of Appeals. On December 17, 1984, the Ninth Circuit affirmed the trial court order of dismissal, finding the appeal frivolous.[3] Holding that "Kerrigan's conduct in this case has been both burdensome and costly to the litigants and has caused them unnecessary trouble and expense," the Ninth Circuit awarded double costs and $250.00 each to EDWARD T. BUTLER, to LUCE, FORWARD, HAMILTON & SCRIPPS and to SCALES, PATTON, ELLSWORTH AND CORBETT. These amounts have not been paid.

II

SUMMARY OF ARGUMENT

No basis exists to grant this petition for a writ of certiorari. Kerrigan's Complaint and Amended Complaint simply failed to state a claim upon which relief could be granted. The dismissal of the complaint was proper and did not conflict with applicable decisions of this Court. This petition is nothing more than one more frivolous disabuse of the judicial system by Mr. Kerrigan, for which he should be subjected to sanctions.

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[3]Petitioners' Appendix, pages A-8 to A-12.

III

ARGUMENT

Rule 17 of the Rules of the Supreme Court of the United States sets forth the general standards for seeking review of a case on a writ of certiorari:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor."

Rule 17 then sets out some categories, indicating the character of reasons that will be considered in granting or denying a writ of certiorari. Kerrigan's own brief makes it clear that this case does not fit within any of these categories and does not warrant review on a writ of certiorari. Kerrigan is merely dissatisfied with the decisions of the California courts in separate but related cases and with the decision of the district court and the court of appeals in this case that his rambling and incoherent complaint[4] does not state a cause of action.

A. The Decision of the Ninth Circuit Does Not Conflict With Applicable Decisions of This Court.

Kerrigan's only attempt to fit this case within the parameters of U.S. Sup. Ct. Rule 17 is contained in Section III of his petition.[5] There they state:

> "The court below making its own determination of the extent of jurisdiction of California courts is inconsistent with decision of the United States Supreme Court."

This argument is based entirely on Kerrigan's erroneous assertion that the "court below" made a ruling on the

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[4]Amended Complaint, Petitioners' Appendix, pages A-13 through A-51. Even a brief review of this pleading will show its inadequacy and will support the propriety of the district court's dismissal.

[5]Petition for Writ of Certiorari, pages 11-12.

propriety of state court proceedings. This is *not* what happened. Kerrigan's complaint was dismissed simply because they repeatedly failed to plead a claim upon which relief could be granted. The Ninth Circuit clearly stated:

> "We have examined the record in this case, and we find that Kerrigan has failed to allege the necessary elements of a 1983 action. Mere statements that the defendant acted illegally or that Kerrigan was entitled to 'Freedom from coercion and intimidation,' the 'Right to due process of law,' the 'Right to equal protection of law,' and other such conclusionary remarks do not satisfy the requirement of specificity for a 1983 action. Other parts of the record failed to remedy the inadequacies of the complaint."[6]

The Ninth Circuit's decision did not conflict with applicable decisions of this Court. To the contrary, the dismissal of a complaint which tries to substitute conclusory ramblings for the necessary elements of an action under 42 U.S.C. section 1983 is in clear accord with established federal law. *See, e.g., Mescall v. Burrus,* 603 F.2d 1266, 1269 (7th Cir. 1979) (upholding dismissal of a civil rights claim) and *Williams v. Gorton,* 529 F.2d 668, 671 (9th Cir. 1976) (upholding dismissal of a civil rights claim limited to conclusory claims that a constitutional right was impaired).

B. Kerrigan's Dissatisfaction With Earlier State Court Rulings Does Not Warrant a Writ of Certiorari.

Even a cursory examination of Kerrigan's petition and complaint indicates that he is merely dissatisfied with state court rulings in an isolated case. The district court was correct in dismissing Kerrigan's complaint because their individual dissatisfaction with the state court proceedings

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[6]Memorandum Decision, United States Court of Appeals for the Ninth Circuit, page A-10, Petitioners' Appendix.

was not a proper basis for a section 1983 claim. *Environmental Aid, Inc. v. Goddard,* 433 F.Supp. 906, 911 (W.D. Pa. 1977). As the court noted in *Buckley Towers Etc. v. Buchwald,* 595 F.2d 253, 254 (5th Cir. 1979):

> "[T]he Civil Rights Acts do not provide a remedy against unfounded or even malicious claims or suits in state courts."

See also, Curry v. Ragen, 257 F.2d 449, 450 (5th Cir. 1958), *cert. den.,* 358 U.S. 851 (1958).

Even if Kerrigan were correct that the California state court imposition of sanctions for a frivolous appeal was improper, that would not justify the issuance of a writ of certiorari. No question of general importance is presented because, among other reasons, after the sanction order was issued against Mr. Kerrigan, the California Supreme Court changed the procedures for granting sanctions on a frivolous appeal. *In re Marriage of Flaherty,* 31 Cal.3d 637 (1982). Where an issue sought to be reviewed concerns a statute no longer in effect, the issue does not merit consideration by the United States Supreme Court. *District of Columbia v. Sweeney,* 310 U.S. 631 (1940) (holding that the matter was no longer of public importance); *Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 76-77 (1955), in which the Supreme Court dismissed a writ of certiorari as improvidently granted noting:

> "Had the statute [changing the law under which the case was originally brought] been properly brought to our attention and the case thereby put into proper focus, the case would have assumed such an isolated significance that it would hardly have been brought here in the first instance."

C. Kerrigan's Claim of an Erroneous Decision Below Does Not Justify a Writ of Certiorari.

Kerrigan's entire claim is that the district court and the court of appeals erred in deciding the case:

> "The court below erred. . . ."[7]
>
> "Court below erred. . . ."[8]
>
> "Court below premised its decision on clear misrepresentations of state court proceedings not in issue."[9]
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> "The court below erred. . . ."[10]
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> "The court below erred. . . ."[11]
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> "Court below erred. . . ."[12]
>
> "Court below erred. . . ."[13]

This isolated dissatisfaction does not justify intervention by this Court. The United States Supreme Court does not "sit for the benefit of the particular litigant." *Rice v. Sioux City Memorial Park Cemetery, Inc., supra,* at 74.

> "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . . .'"

N.L.R.B. v. Pittsburgh S.S. Co., 340 U.S. 498, 502 (1951).

D. Kerrigan's Arguments on Attorneys' Fees and Costs Should Be Ignored.

In his petition, Kerrigan raises two issues relating to attorneys' fees and costs. Neither is relevant on a petition

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[7]Petition for Certiorari, Section IV, page 13.

[8]Petition for Certiorari, Section V, page 14.

[9]Petition for Certiorari, Section VI, page 15.

[10]Petition for Certiorari, Section IX, page 22.

[11]Petition for Certiorari, Section X, page 23.

[12]Petition for Certiorari, Section XI, page 24.

[13]Petition for Certiorari, Section XV, page 29.

for certiorari and their entire discussion of the matters should be ignored as ludicrous and incorrect as a matter of law.

1. The Ninth Circuit Had Discretion to Award Attorneys' Fees and Double Costs.

Kerrigan's argument that the court of appeals did not have authority to award fees and costs is based on a typographical error in the Memorandum Decision. The court inadvertently referred to the "Federal Rules of Civil Procedure," instead of the Federal Rules of Appellate Procedure. Kerrigan was not misled, as the matter was clearly stated in the briefs to the Ninth Circuit.

An award of attorneys' fees and double costs was appropriate in this case. Kerrigan is incorrect in claiming that the Ninth Circuit did not make findings justifying the award. The court of appeal specifically found that:

> "Kerrigan has made serious allegations, which lack any merit against many lawyers and a judge, and he has filed this action based upon an earlier state court action, which both trial and appellate courts have dismissed. The California Court of Appeals characterized one appeal as 'a sham proceeding' and in another case imposed a $1,000 sanction against Kerrigan 'for taking this frivolous appeal.'
>
> "Kerrigan's conduct in this case has been both burdensome and costly to the litigants and has caused them unnecessary trouble and expense."

Kerrigan argues that the sanction award was based on actions in the California courts.[14] This is simply untrue. The award was specifically based upon Kerrigan's multiplication of proceedings before a United States court[15]

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[14]Petition for Certiorari, Section XIV, page 28.

[15]Petitioners' Appendix, page A-11.

and upon the meritless and expensive action filed by them in the district court.[16]

2. No Basis Exists for Kerrigan to Claim Error in Not Imposing Sanctions Against Seltzer Caplan Wilkins & McMahon.

At the end of the brief, Kerrigan raises the preposterous notion that the court of appeals should have imposed sanctions against respondents' attorneys! No factual or legal basis exists for this claim; no such request was ever made to the court of appeals. The entire issue is completely irrelevant on a petition for a writ of certiorari. The claim is merely the latest example of Mr. Kerrigan's proclivity to attack every lawyer who gets in the way of his vendetta.

E. Kerrigan Should Be Subjected to Sanctions for Filing This Petition.

Mr. Kerrigan is an attorney. As such, he owes a duty to the courts and to society to not take advantage of his position. Instead of following this duty, he has forced the various parties to defend themselves before the California Superior Court for the County of San Diego, the California Fourth District Court of Appeal, the District Court for the Southern District of California and the Ninth Circuit Court of Appeals. Each of these courts has confirmed that Mr. Kerrigan's claims are baseless and frivolous. Still not satisfied, he has filed this petition, knowing that no basis exists for a writ of certiorari and knowing that the sole effect will be to cause increased attorneys' fees and costs to respondents.

Mr. Kerrigan's activity constitutes unprofessional conduct. *Polk County et al. v. Dodson*, 454 U.S. 312, 323 (1981): "It is the obligation of any lawyer . . . not to clog the courts with frivolous motions or appeals." Sanctions should be imposed under U.S. Sup. Ct. Rule 49.2.

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[16]Petitioners' Appendix, pages A-11 and A-12.

"This appeal is an attempt to invoke the Court's jurisdiction on an utterly frivolous claim. Such efforts should subject the attorney who filed the jurisdictional statement to the sanction of Rule 49.2 of this Court, at least where, as here, the appellee has moved for an award of costs and fees."

Talamini v. Allstate Insurance Co., No. 84-18, slip op. (U.S. Sup. Ct. Mar. 25, 1985) (available on LEXIS, Gen. Fed. Library, Sup. File), (Burger, C.J., concurring).

IV

CONCLUSION

The petition for writ of certiorari filed by WALTER F. KERRIGAN and DOROTHY R. KERRIGAN lacks any merit. It should be denied and sanctions should be imposed on petitioners to at least partially compensate respondents LUCE, FORWARD, HAMILTON & SCRIPPS, STEVEN S. WALL and JULIE A. GREENBERG for the expenses incurred in opposing this petition.

DATED: May 1, 1985

Respectfully submitted,

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